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JURISDICTIONAL STATEMENT

Respondent accepts and adopts Informant's Jurisdictional Statement.

STATEMENT OF FACTS

Respondent grew up in Iron County, attending Ironton High School (now Arcadia Valley). He attended the University of Missouri at Rolla, obtaining a B.S. degree in civil engineering. Respondent worked as an engineer in St. Louis while attending law school at night, at St. Louis University for five years. He is a registered engineer in Missouri (1970) and Illinois (1970). **T.** 221. Respondent joined the law firm of Kenney, Leritz and Reinert in December, 1971, in St. Louis. Eventually the firm was known as Reinert & Duree. Respondent remained with that firm, until December 31, 1998 (13 days after the Kansas Supreme Court decision). **T.** 221.

While working full time as an attorney, Respondent attended Washington University Law School, obtaining a master's degree in tax law in 1976. **T.** 221-222. He has not practiced tax law, however, and does not prepare his own tax returns. **T.** 222.

Respondent practiced law together with Bernard Reinert for twenty-seven years, leaving the firm only because it was too difficult to explain the Kansas Supreme Court decision to the institutional clients of the firm. **T.** 222.

Respondent is admitted to practice law in the states of Missouri (1971) and Illinois (1972). He is also admitted to practice before the United States District Courts for the Central and Southern District of Illinois, the Eastern and Western Districts of Missouri and the District of Colorado. He is admitted to practice before the United States Circuit

Courts of Appeal for the Second, Fifth, Sixth, Seventh, Eighth and Federal Circuits, as well as the United States Supreme Court.

Respondent has previously handled several cases against Doctor's Associates, Inc. ("DAI"), the franchisor for the Subway Sandwich Franchise System. Robert Carter of the Reinert & Duree firm assisted Respondent on these cases. Respondent would generally take the depositions of key employees of DAI, and argue some of the key motions. Robert Carter would take other depositions and defend depositions initiated by DAI, as well as gather documents and prepare motions. **T.** 223-224.

Respondent, Reinert & Duree, P.C. and Robert Carter were first retained by Nancy Kessler and Dane Banks ("Kessler & Banks") during 1991. Kessler & Banks were already involved in litigation with DAI and some of its affiliated companies in Johnson County, Kansas, having previously filed a counterclaim for fraud. Robert Seiffert of Rubin, Brown & Gornstein was employed to calculate damages. He is a certified public account. **T.** 39-41. He had previously testified in several cases, as an expert witness on damages, in which Respondent represented either franchisees or landlords in suits against DAI and affiliated parties. **T.** 41-42.

Robert Seiffert, along with Respondent, Robert Carter and Kessler & Banks had three meetings in St. Louis before the amended tax return was filed in January, 1993. **T.** 67-68. **Ex.** JJ.

Mr. Seiffert kept contemporaneous notes of the meetings.

Respondent was at all three meetings, but dealt primarily with liability issues, while Robert Carter was more involved in issues concerning damages. **T.** 68-69.

During the September 18, 1991 (initial) meeting, Kessler represented that Kessler & Banks had obtained an extension in which to file their 1990 partnership tax return. Mr. Seiffert subsequently learned that was incorrect, and that they were out of time for that tax return. **T.** 69.

Kessler & Banks operated their Subway franchise store for 18 months, between 78 and 82 weeks. This covered approximately the last 9 months of 1989 and the first 9 months of 1990. **T.** 66.

Kessler & Banks filed for bankruptcy during, about, March 1990, under Chapter 13, which was voluntarily dismissed on about October 25, 1990. **T.** 70, 214. **Ex.** PP. Respondent did not represent them in the bankruptcy.

Kessler & Banks also lost their house, through foreclosure and Dane Banks sold about $30,000 worth of musical equipment to help pay debts. **T.** 70-71, 214-215. Kessler & Banks had $180,000 in assets when they began operating their Subway franchise, **T.** 126, with a bank balance of zero and $135,670 in unpaid creditor obligations and judgments shortly after they stopped operating the business. **T.** 216, **Ex.** B, p. 28-34. Dane Banks was physically handicapped. **T.** 66.

Kessler & Banks also "bounced" more than 200 checks during the 18 months they operated the franchise business. **T.** 215. By the end of the 18 months they had been terminated for nonpayment of royalties by DAI and had received a number of "dun" letters from various creditors. **T.** 215.

During the first meeting, Mr. Seiffert considered the possibility of calculating damages on a loss profits basis since Kessler & Banks contended that they had been

precluded from buying other Subway store and their tax return for 1989 (the first 9 months of operation) indicated a profit of about $20,000. **T.** 72-73. **Ex.** I. After the initial September 18, 1991 meeting, Mr. Seiffert received the original 1989 tax return and some additional documents which raised some questions. Mr. Seiffert scheduled an additional meeting which was held on March 7, 1992. **T.** 80. Mr. Seiffert noticed that the original 1989 tax return was inconsistent with the other documents provided. **T.** 81-83, **Ex.** CC. The original tax return stated that the year end cash balance for 1989 was $41,653, whereas the bank records reflected a negative cash balance (overdraft) of $2,254. **T.** 83, **Ex.** BB, p. 1-21. This difference of about $44,000 indicated that something was wrong. The gross receipts could have been overstated, or the deductible expenses understated, or a combination thereof, or some other problem could account for the discrepancy. **T.** 84-85. If the deductible expenses were understated, the reported taxable gain of about $20,000 would be changed to a tax loss of about $22,000 (sic $24,000). **T.** 85.

Mr. Seiffert could not initially determine the source of the other deductions reported on the original tax return. Eventually he found that most of them matched an interim report for the period ending on September 30, 1989, reflecting that the corresponding expenses for the balance of the year were not deducted. **T.** 86-89. He located bank records reflecting bank charges of about $2, 629 which had not been deducted, **T.** 90, cancelled checks reflecting about $550 more in equipment rental expenses than were deducted, **T.** 90-91, $673 in insurance expenses, paid by check, which were not deducted, **T.** 91, and $1,944 in professional fees and $1,773 in telephone

expenses, paid by check, which were also not deducted. **T.** 91-92. He found more than $6,000 in expenses from cancelled checks that had not been deducted on the original 1989 tax return. **T.** 92. Mr. Seiffert discussed these matters with Nancy Kessler who agreed that the original tax return was wrong and needed to be amended. **T.** 85, 92-93. Mr. Seiffert arrived at this conclusion without any consideration of the amount of gross receipts listed on the original 1989 tax return. **T.** 93.

For the reasons just stated, Mr. Seiffert recommended that Nancy Kessler file an amended 1989 tax return. Respondent had no role in that decision, and was not part of these discussions with Nancy Kessler. **T.** 95. Nancy Kessler and Mr. Seiffert then jointly recommended to Respondent that an amended tax return be prepared, and Respondent agreed with the recommendation. **T.** 96. Respondent had no other role in the preparation of the amended tax return. **T.** 96-97. Mr. Seiffert did discuss his opinion that Kessler & Banks actually lost money in 1989 and also offered his opinion that damages could not be calculated on the basis of a lost profits approach, because Kessler & Banks did not have a track record of profitability. **T.** 97. From that point forward (March, 1992), his efforts to calculate damages were based strictly upon an out-of-pocket loss approach. **T.** 97-100. He recorded that decision in his handwritten notes during that meeting. **T.** 98. Thereafter, Mr. Seiffert began to work on preparing an amended 1989 tax return as well as an original 1990 tax return and several other tax returns for Kessler & Banks for years in which they had not filed tax returns, including a personal tax return for Nancy Kessler for 1986. **T.** 100, 177.

As Mr. Seiffert started to accumulate additional financial records from Kessler & Banks, he found 43 of the weekly sales and inventory reports ("WISRS") for the 78 to 82 weeks Kessler & Banks were in business. That did include, however, all the WISRS for 1989. **T.** 101. Kessler & Banks never recorded any of their expenses on the WISRS, as required. **T.** 102. The gross receipt numbers on the WISRS are obtained from a form called a "control sheet", in which sales for each day are recorded. **T.** 102. The gross sales figures on the WISRS are merely transferred there from the control sheets. Mr. Seiffert was able to find only 13 control sheets for the 78-82 weeks of operation, covering the first 12 weeks of operation in 1989 and one control sheet for a week in September, 1990. **T.** 103, 105-106. The control sheets are actually envelopes in which the franchisees also keep the Z cash register tapes, payout sheets and other internal control documents. **T.** 106-107, **Ex.** GG. The franchisees turn in the weekly WISRS, but not the control sheets. The control sheets must be kept on the premises, however, so that DAI's field representatives can inspect them. **T.** 107-108.

The field representatives issue compliance reports. The compliance reports consistently stated, over 18 months, that Kessler & Banks were not doing their paperwork. They were not filling out the WISRS or control sheets and were not keeping the appropriate documents inside the control sheet envelopes. **T.** 108.

Z tapes are cash register documents issued when the cash register is closed out for the day. The Z tape takes the cash register subtotal back to zero for the following days receipts. An X tape rings up the current subtotal for the day, but does not return the subtotal to zero. If an X tape is used to close out the cash register at the end of the day,

the close out Z tape at the end of the following day will show the receipts for both days. **T.** 108, 109.

From an accountant's viewpoint, the control sheets are far more important than the WISRS. **T.** 103. The cash registers also maintain a cumulative grand total for each machine, for the life of the cash register, which cannot be returned to zero or otherwise changed without destroying the cash register. **T.** 113, 114. The grand total figure reported for each cash register is used to maintain control, to make sure that Z tapes are properly recorded, any over-rings are accounted for and to otherwise maintain the integrity of the accounting system. **T.** 114. The control sheets require that the closing grand total and opening grand total for each day be reported. **Ex.** GG, left column, about half-way down. Over-rings occur when a sale is rung up, but there is no completed sale. **T.** 110. Adjustments for over-rings must be made manually on the Z tapes and entered on the control sheets. **T.** 110-111.

Mr. Seiffert interviewed Nancy Kessler about operation of the cash register, the control sheets, Z tapes and X tapes and learned that she did not understand how they operated. She acknowledged that on several occasions that she had used an X tape to ring up the totals for the day, resulting in an incorrect sales figure for the following days. **T.** 112. She failed to complete the control sheets, or to reconcile them with cash, on a daily basis, as required. **T.** 113. After the eighth week of operation, she stopped filling in the grand total figures on the control sheets because she was unable to reconcile the sales figures with the grand totals. **T.** 115. Mr. Seiffert recorded this interview in his contemporaneous handwritten notes of the third meeting on October 3, 1992. **T.** 115-

116. Nancy Kessler also failed to count cash, or correctly record daily bank deposits on the control sheets. **T.** 118-119, **Ex.** GG. The control sheets also provide for the transfer of figures from the left hand column to the right hand column. On the control sheet for the first week of operation, she entered a figure for adjustments in the sum of $5,909.38, when it should have been (simply transferring the figures) $4,216.59. It was off by about $1,500. On the same sheet, she entered a figure of about $6,400 instead of approximately $4,700, simply in transferring the figures. **T.** 120, 121. On June 18 (**Ex.** GG) she entered an adjustment of $6,307, when it should have been $9.20. **T.** 121. Mr. Seiffert found a number of other mathematical errors throughout the 13 control sheets that could be found. **T.** 121-122. Based upon this investigation, Mr. Seiffert concluded, in October of 1992, that the WISRS and control sheets were not reliable. He had concluded earlier, during March, 1992, that the original tax return was incorrect. **T.** 122.

Mr. Seiffert conferred with Mahlon, Rubin and Joe Marchbein at Rubin, Brown & Gornstein. Mahlon Rubin is one of the founding partners and Joe Marchbein had worked for the Internal Revenue Service for about 25 years. The three of them eventually concluded that the bank records method was the best way of preparing the amended tax return. This method is permitted by 26 U.S.C. § 446. **T.** 123-126, 129.

26 U.S.C. § 446 permits several alternative methods for preparing tax returns when the records of the taxpayer are incomplete or unreliable. The bank records method and the net worth methods, in which the beginning and ending net worth figures are used to estimate taxable gains or losses, are among those alternative methods. **T.** 126, 127. The procedures which an accountant is to follow in preparing tax returns under these

circumstances are set forth in Circular 230. **T.** 125, **Ex.** FF. These procedures require that the tax return contain a disclaimer or a disclosure. **T.** 125-128.

Mr. Seiffert did not confer with Respondent about how to prepare the amended tax return, but did advise Respondent, briefly, on October 3, 1992 that he might possibly need to prepare the amended tax return on the basis of bank records and may need to include a disclosure or disclaimer. **T.** 123-124.

Respondent never asked Mr. Seiffert to prepare an incorrect or false tax return. **T.** 124. Mr. Seiffert eventually used the bank record method for both revenues and expenses in preparing the amended tax return. **T.** 124-125.

By using the bank deposit method, Mr. Seiffert did not use any of the first party records of Kessler & Banks, but only third party records of the banks. He concluded that the first party records of Kessler & Banks were incomplete, inconsistent or incorrect. **T.** 131. He used the same method in preparing the original partnership tax return for 1990. **T.** 131-132.

His opinion is consistent with the June 9, 1995 summary judgment decision of Judge Russell. In granting summary judgment to DAI on Kessler & Banks counterclaim for fraud, Judge Russell concluded that Kessler acknowledged that her books and records were to incomplete to provide any basis for anyone to draw conclusions from, that Kessler & Banks lost their franchise and lost the money they had invested in the franchise, that they opened their store in April, 1989 with no operating funds and "this fact combined with **Ms. Kessler's apparent inability to keep books and records in her store** meant that the operation was conducted in **financial chaos from the start**". **Ex.** F,

pp. 4, 6, 10. The summary judgment ruling continued, holding that Kessler & Banks failed to follow the procedures recommended by Mr. Kaplan, who had done some accounting work for them, and that Mr. Seiffert had testified, by deposition, that the books and records kept by Kessler & Banks were so bad that you could not make business decisions from them. **Ex.** F, p. 12. Mr. Seiffert agreed with those conclusions during his testimony before the hearing panel, as well as his pre-summary judgment motion deposition. **T.** 133-135. Mr. Seiffert did not disregard the WISRS or control sheets in preparing the amended tax return, but, after a considerable amount of due diligence, determined that they were not reliable for purposes of preparing the tax return. **T.** 135.

Respondent had no role in determining the language in the disclaimer added to the amended tax return. **T.** 137.

The subsequent rulings in Kansas refer to Mr. Seiffert's deposition testimony in which he allegedly contended that he did not use the WISRS because he could not find them. **T.** 137-138. **Ex.** 1, p. 5. His actual deposition testimony is included in **Ex.** CC at p. 1-84.

His deposition testimony is as follows: (**Ex.** CC. p. 1-84)

"**Q.** (by Mr. Dunham) The record will reflect that Ms. Kessler and Mr. Banks opened their store on or about April 12, 1989. Have you ever gone through the WISRS that Mr. Carter gave you copies of to see for how many weeks in 1989 reports exist?

A. No, I did not. And the reason I didn't was because they were not a complete and accurate reflection of the activity.

Q. We'll get to why a little bit later, ***'"

Mr. Dunham never returned to the question of why Mr. Seiffert believed the WISRS were not a complete and accurate reflection of the activity. **T.** 137-139.

It is Mr. Seiffert's opinion, within a reasonable degree of certainty, that Kessler & Banks lost money in 1989 and 1990, that the original tax return for 1989 is incorrect, and that the amended 1989 tax return reflecting a loss of about $17,000 is correct, and even a conservative determination of their tax loss. **T.** 139, 140.

The amended 1989 tax return was treated by the Internal Revenue Service as the operable tax return for 1989. The original 1989 tax return was not treated as the operable return after the amended return was filed. **T.** 59-60.

The amended 1989 tax return was reviewed by the Internal Revenue Service. Mr. Seiffert could determine that from the case referral documents and notations on the original "filed" amended return, obtained from the Internal Revenue Service after the summary judgment hearing. **T.** 59, **Ex.** RR, pp. 29, 30.

Mr. Seiffert also prepared amended individual tax returns for Nancy Kessler and Dane Banks for 1989 and 1990. The same disclaimer was attached to those individual tax returns and to the original 1990 partnership tax return prepared by Mr. Seiffert, in the same fashion as the amended 1989 tax return. **T.** 60-63.

DAI attached the affidavits of Geoffrey Hazard and Ned Allen Ford to its sanctions motions in Kansas. Respondent took the pre-hearing deposition of both.

Geoffrey Hazard claimed no expertise in tax or accounting matters. **Ex.** SSS, p. 31. He was willing to offer his opinion, however, as a lay witness, that the 1989 tax return would be a "false" tax return even if it accurately reported taxable income. p. 32. He acknowledged that he had not reviewed the original 1989 tax return. pp. 32-33. He charged $6,750 for about two-three hours of work before signing his affidavit. p. 31. He acknowledged that his affidavit contained several statements about Respondent conceiving a plan to file a false federal tax return, for which he claims no personal knowledge. **Ex.** SSS, pp. 34-35.

Ned Allen Ford, DAI's tax expert did not testify. Portions of this pre-hearing deposition were read into evidence by Respondent. That testimony established that Mr. Ford had not reviewed any of the records of Kessler & Banks other than one sample WISR, had not determined the taxable income for Kessler & Banks for 1989, did not review the original 1989 tax return, and had not been requested to determine the taxable income for 1989. **Ex.** SSS, pp. 38-39, 42-43. He also acknowledged that he is not a CPA, having failed the CPA examination the only time he took it, and that he is neither authorized nor qualified to appear before the Internal Revenue Service on behalf of taxpayers. **Ex.** SSS, pp. 37-38.

Mr. Seiffert did not deduct identifiable expenses for franchise fees and interest of more than $12,000, in preparing the amended tax return, even though he knew such expenses existed, because they were not documented by the bank records. The interest expense was included in the documents about the foreclosure of Kessler & Banks' home. **T.** 140-141.

Mr. Seiffert calculated damages on the basis of out-of-pocket losses sustained by Kessler & Banks, using third party records, not the records of Kessler & Banks. **T.** 208-209. That included determining the assets they started with, in combination with their business obligations that remained at the conclusion of their 18 months of operation. **T.** 208-209. He calculated total damages of $255,257. **Ex.** B, p. 58. If he deducted the difference between the original and amended tax returns ($37,000) from his total damage calculations, damages would be reduced from $255,00 to $218,000. **T.** 208. He testified that he had absolutely no incentive to prepare a false tax return to increase the damage calculation from $218,000 to $255,000. **T.** 208. His damage calculations of $255,257 were filed with the Kansas Court before the summary judgment motion was heard. **Ex.** B.

All pretrial work had been completed at the time the summary judgment motion was filed in the spring of 1995. Respondent and Mr. Carter had filed a pre-trial questionnaire, listing their witnesses and exhibits. The tax returns were not among the numerous exhibits listed. **Ex.** W.

DAI filed a massive summary judgment motion on Kessler & Banks counterclaim for fraud, alleging 267 paragraphs of uncontested facts. **Exs.** A and B. Robert Carter prepared Kessler & Banks written response to the 267 paragraphs of alleged uncontested facts and Kessler & Banks brief in opposition to the summary judgment motion. Attached to these documents was an affidavit of Mr. Seiffert, prepared by Mr. Seiffert. **T.** 147-148, **Ex.** B.

Respondent did not prepare the written responses to the summary judgment motion or to the 267 paragraphs of alleged uncontested facts. These were prepared by Robert Carter, signed by Robert Carter and Sue Linda Jamison, and filed with the court by Sue Linda Jamison. The amended 1989 tax return was not attached to Kessler & Banks responses to the summary judgment motion, but was referenced by Mr. Seiffert's affidavit, which was attached.

Seven volumes of appendices were filed for and against the summary judgment motion, in addition to the motion, statement of 267 paragraphs of alleged undisputed fact, response, and briefs. The seven volumes of appendices were marked as **Ex.** MMM. When stacking them, one on top the other, they rise to a level of 2 feet. **T.** 222, 299.

They were not offered into evidence, because Informant acknowledged that Informant was not contending that Respondent violated Rule 4-3.1 by prosecuting the counterclaim for fraud without a good faith belief in its viability for any reason other than the alleged use of the amended tax return. **T.** 219-220. Informant's attorney stated:

T. 220. "The information goes to the tax return and not to the issue that Mr. Duree has brought up."

It was Respondent's responsibility, among co-counsel, to conduct the oral argument against the summary judgment motion. Oral argument occurred on April 13, 1995. **T.** 224, **Ex.** D.

Shortly before April 13, 1995, Robert Carter asked Respondent if he could file a motion for sanctions against DAI, and Mr. Dunham, for claiming as uncontested, facts which were really contested. **T.** 224. Mr. Dunham and DAI had previously filed several

motions for sanctions against Respondent and Mr. Carter in this and other cases against DAI. **T.** 224.

Respondent recommended against filing the motion for sanctions. Mr. Carter persisted. Respondent relented, stating "go head", "just be sure you right". **T.** 224, 225. Respondent did not prepare, read, sign or file the motion for sanctions. This was the only motion for sanctions that Respondent can recall that he or members of his firm ever filed against DAI or Mr. Dunham. **T.** 224. The motion for sanctions was filed on April 12, 1995, the day before oral argument on the summary judgment motion. Mr. Carter faxed a copy to DAI's Kansas attorney. **T.** 225. Respondent was in route to Kansas, by automobile, on April 12. **T.** 225.

The motion for sanctions against DAI and Mr. Dunham was not on the docket for April 13. Only the summary judgment motion was scheduled for hearing on that date. **T.** 229, **Ex.** D. After the summary judgment oral argument, Respondent recommended that Mr. Carter withdraw the motion for sanctions. He did. It was never argued. **T.** 229. The motion for sanctions does not refer to the tax returns, but does allege that DAI and Mr. Dunham argued, as uncontested, facts which were really disputed. **Ex.** C.

Mr. Dunham argued in support of the summary judgment, primarily, that there was no clear and convincing evidence that Kessler & Banks losses were caused by the alleged fraud of DAI. **Ex.** D, p. 25, 29.

Mr. Dunham then referred to the motion for sanctions against him that had been filed the previous day. **Ex.** D, p. 33, 37, 46. Mr. Dunham then handed a copy of the amended tax return to Judge Russell. **Ex.** D, p. 46. Mr. Dunham then returned to arguing

against the sanctions motion, **T.** 47, 48, arguing that if anyone should be sanctioned, it was the attorneys for Kessler & Banks. **Ex.** D, p. 48.

Respondent stated that the amended tax return was an evidentiary detail which is not controlling on any of the ultimate issues of fact. **Ex.** D, pp. 61-62. The court asked Respondent if the tax return had been filed. Respondent stated that he could not state whether it had been filed or not, without double checking.

Judge Russell then responded that it disturbed her that Respondent was attacking Mr. Dunham's ethics about a tax return without knowing whether it had been filed or not. **Ex.** D, p. 62.

Respondent responded again, that while the amended tax return may have something to do with the motion for sanction, it has nothing to do with the motion for summary judgment. It is an evidentiary detail on which the two experts disagree. **Ex.** D, p. 63.

Finally, Respondent stated one more time that the tax return was not outcome determinative. **Ex.** D, p. 92.

Within eleven days after the oral argument, Respondent checked with Sue Linda Jamison, determined that the amended tax return had been filed during January, 1993, and arranged for her to file an affidavit with the court so stating. **T.** 231.

Respondent did not believe the tax returns were significant with respect to the summary judgment motion. Only paragraphs 143 and 159 of the 267 paragraphs of alleged undisputed fact referred to the tax returns. The response to those paragraphs relied upon the affidavit of Mr. Seiffert which referred to the amended tax return. That

response was prepared by Robert Carter, signed by Robert Carter and Sue Linda Jamison, and filed by Sue Linda Jamison. In ruling on the summary judgment motion, Judge Russell concluded that only four paragraphs of undisputed fact were really in dispute, including paragraphs 143 and 159. **Ex.** F, p. 4, stating:

> "The court has concluded that there is only a good faith controversy concerning facts and 143, 150, 159 and 183, and **the court does not deem these facts to be material."**

That was consistent with the belief of Respondent, who had not read the amended tax return, did not know of its method of preparation and did not know of its alleged falsity at the time of the oral argument on the summary judgment motion. **T.** 250.

Respondent still had not read the amended tax return at the time of a hearing on August 7, 1995. During that hearing, Respondent was unable to identify the amended tax return as such, incorrectly referring to it as an original partnership tax return for 1989 because it does not state "amended tax return" at the top, in the same fashion as the personal, amended, tax returns. **T.** 251, 255, 256. The amended tax return is identified as such by an "X" in a small box two inches from the top on the right hand side of the first page. **Ex.** LL.

After August 7, 1995, and after identifying, for the first time, the amended tax return, Respondent filed a pleading with the court specifically for the purpose of clarifying that Respondent had misidentified the amended 1989 tax return as the original 1989 tax return during the August 7, 1995 hearing, because he was unfamiliar with it. **T.** 257, 258. **Ex.** H. The tax returns were attached to that pleading. **Ex.** H.

After the summary judgment motion was granted, DAI was granted leave to take discovery, on August 7, 1995, to learn if Respondent had engaged in sanctionable conduct with respect to the amended tax return. Thereafter, DAI filed its motions for sanctions and to remove Respondent's authority to appear in Johnson County, Kansas, pro hac vice contending that Respondent had "manufactured" a false amended tax return for use in the case.

The sanctions motion was against Respondent, his law firm, Robert Carter and Sue Linda Jamison. They were heard during two half-day sessions on March 8, 1996 and April 16, 1996.

On or before May 24, 1996, Judge Russell engaged in an ex parte conversation with John Gerstle, an old friend and criminal defense lawyer. Judge Russell subsequently testified that the ex parte conversation occurred on May 24, 1996. **Ex.** S, p. 23. John Gerstle testified that, while he could not be sure, he believed the conversation occurred in 1995. pp. 56, 93. Mr. Gerstle represented Nancy Kessler on two charges of forging checks. **Ex.** S, p. 64-65. The charges had nothing to do with drugs. **Ex.** S, p. 67. During her probation period, Nancy Kessler was charged with allegedly refusing to take a screening test in October, 1993 and allegedly tested positive for drug use in November, 1995. Her probation had also been suspended during June, 1993. **Ex.** S, p. 68.

Respondent knew that Nancy Kessler was charged with forging several small checks, after he began to represent her, and that she subsequently pleaded guilty and was given a suspended sentence. Respondent did not know about the drug allegations until a

few weeks before the hearing of July 8, 1997 set forth in **Ex.** S, when his attorney obtained those records for that hearing.

On July 8, 1997, Judge Russell testified that she granted the summary judgment motion (June 9, 1995) because she had concluded that Kessler & Banks kept such poor business records they would never be able to sustain, at trial, their burden of proving that their alleged damages were caused by the alleged fraud. **Ex.** S, p. 19. Judge Russell acknowledged that, while working on the summary judgment motion, she suspected from the fact pattern that perhaps Kessler & Banks were taking money out of the till to support a drug habit, even though there was no evidence of that. **Ex.** S, p. 19. She stated that was not one of the grounds for her decision on the summary judgment motion. **Ex.** S, p. 19.

Judge Russell testified that on May 24, 1996, John Gerstle stopped by her office. She was working on her ruling on the sanctions motions. When she finally identified the case she was working on, John Gerstle stated that he knew a great deal about the case. Judge Russell had harbored suspicions that there was a cocaine problem involved, and she knew that John Gerstle had a criminal defense practice. She then stated, "Cocaine?", and John Gerstle responded, "Oh, yeah. Big time." **Ex.** S, p. 24.

Judge Russell then stated that she was working on a motion for sanctions against Respondent. John Gerstle stated, "Mr. Duree is a great guy. He's really a nice guy. He paid my fees to represent Nancy Kessler." **Ex.** S, p. 25.

Judge Russell then gave the following testimony about that ex parte conversation (**Ex. S**, pp. 25, 30, 31, 32, 33):

"**Q.** From that conversation and from other things that you had heard, you reached certain conclusions at that point in time, May the 24th, about Mr. Duree and certain things. Would you recount – let me just see if I can do it this way.

A. Okay.

Q. You assumed from that conversation that Nancy Kessler was a client of Mr. Gerstle's on some drug charge.

A. I did assume that.

Q. And you further assumed that David Duree knew that Nancy Kessler was taking money from the till of the Subway shop to support her habit.

A. Yes, I assumed that.***(p. 25)

Q. (By Mr. Lancaster) Did you also surmise that*** David Duree had hired—from your conversation with John Gerstle, that Mr. Duree had hired Mr. Gerstle to cover up this – or get rid of this cocaine problem with Nancy Kessler?

A. That would have been my guess.

Q. I beg your pardon?

A. That would have been my guess.***(p. 30)

Q. Now, on May the 31st of 1996, a week later, you filed your memoranda decision sanctioning David Duree $408,000 and change and an order revoking his admission pro hac vice, did you not?

A. Yes, I did.

Q. Now, on November the 8th of 1996, there was a hearing scheduled before you to – which I had filed on behalf of Mr. Duree to reconsider your decision.

A. That's right.

Q. And at that – right just immediately prior to the hearing, you called the counsel to your chambers, including Mr. Dunham and myself, and advised that – advised us that you had had an ex parte communication with someone, and because of that ex parte communication you did not feel you could be impartial and couldn't give Mr. Duree a fair hearing, and that it was appropriate at that point in time for you to recuse yourself.

A. Yes.

Q. Is that an accurate statement of what happened?

A. Yes. (p. 31)

Q. And the basis for your decision that you made on November the 8th that you **couldn't be impartial** was the conclusion that you reached back at the time of this discussion with Mr. Gerstle that David M. Duree knew about Nancy Kessler's cocaine habit, he knew she was taking money out of the business to support her habit, that that was part of the basis for her deciding to amend the '89 tax return, and that was his basis for hiring Mr. Gerstle was to cover this up.

All of these facts caused you to feel you **couldn't be an impartial hearer** of the facts, if you will; isn't that true?

A. Yes.

Q. Okay.

A. I could not set that conversation with John Gerstle out of my mind. I found

it impossible to separate that from the issues that I was called upon to decide that day, and I therefore thought it was appropriate for me to recuse myself.

Q. And while you didn't tell us all that that day, two weeks later, on the 22nd of November, Mr. Dunham and I called and you asked you to tell us why you had recused yourself, and you basically told us what you just told the Court. (p. 32)

A Yes.

Q. Okay.

Now these circumstances that caused you to recuse yourself on November the 8th of 1996 existed – the same set of circumstances existed on May the 31st of 1996, when you filed the memoranda opinion in this case; isn't that true?

A. That is true.

Q. And the same circumstances that caused you to recuse yourself on November 8th, 1996, existed on July 19th of 1996 at the hearing to settle the dispute over the journal entry from your May 31st, 1996, memoranda opinion?

A. That's true." (p. 33)

On cross examination by Mr. Dunham, Judge Russell stated that she had already drafted the memorandum opinion at the time of the ex parte conversation, and so the conversation and her conclusions about Respondent did not affect the drafting of her memorandum opinion. **Ex.** S, p. 38. She also testified that she was working on the

sanctions decision at the time of the ex parte conversation, and was within a few sentences of being done when the ex parte conversation occurred. **Ex.** S, pp. 23-24.

Judge Russell entered the memorandum opinion sanctioning Respondent in the sum of $408,445.25 and removing his authority to appear in that case, pro hac vice, on May 31, 1996. **Ex.** 1. The sanctions were awarded under K.S.A. 60-2007 (now repealed) which provides for sanctions for asserting a claim without a reasonable basis in fact and not in good faith. Subsection C requires a finding of the specific facts and reasons on which findings are based. Subsection D provides that the purpose is not to prevent a party from litigating bona fide claims or defenses, but to protect litigants from harassment and expense in clear cases of abuse.

In the May 31, 1996 memorandum opinion, Judge Russell states (**Ex.** 1, pp. 2-3):

> "In part, plaintiffs' argument for summary judgment was based upon the fact that defendants could not show any actual loss in their business, and therefore a fraud action could not lie.
>
> Defendants, through Mr. Duree, vehemently argued that plaintiffs' argument was frivolous, as an amended 1989 tax return had been filed, showing a loss. On this basis, Mr. Duree demanded that sanctions be assessed against Mr. Dunham for frivolous pleadings."

The court continued (**Ex.** 1, p. 3):

> "It is the amended 1989 tax return that is at the heart of the motions at hand. Mr. Dunham charges that Mr. Duree manufactured the amended 1989 tax returns to serve as a basis for the defendants' fraud claim. After carefully

considering the evidence, the court has reluctantly concluded that Mr. Dunham is correct."

The court continued (**Ex.** 1, p. 5):

"The inescapable conclusion from these facts is that Mr. Duree deliberately caused to be prepared a false tax return for use in this litigation."

The court continued (**Ex.** 1, p. 8):

"Mr. Dunham is requested to draw a journal entry **setting forth the findings and conclusions contained in this memorandum opinion."**

Judge Russell made no finding that Respondent had prosecuted the counterclaim for fraud in bad faith for any reason other than the alleged use of the alleged false tax return.

Instead of preparing a proposed journal entry (judgment) which recited the terms of the judgment, and stated that it was entered in accordance with the attached memorandum opinion, Mr. Dunham drafted a journal entry from scratch, which contains numerous deletions and additions from the memorandum opinion. **Ex.** 2. Paragraphs 9 and 10 of the journal entry prepared by Mr. Dunham contain "findings" that Respondent prosecuted the counterclaim for fraud without a good faith belief in the viability of the counterclaim for reasons other than alleged use of the alleged false tax return. **Ex.** 2, ¶¶ 9,10. These "findings" are not contained within the memorandum opinion. **Ex.** 1. The journal entry contained specific findings that Respondent violated Rules of Conduct 3.3, 3.4 and 8.4. **Ex.** 2, ¶ 8. These findings were not contained within the memorandum opinion. The findings in the memorandum opinion that the amended tax return was at the

heart of the motions at hand was deleted, as were the memorandum opinion findings that Respondent had vehemently argued the amended 1989 tax return in opposition to the summary judgment motion and that Respondent had demanded that sanctions be assessed against Mr. Dunham on that basis.

Mr. Dunham also added the "finding" that Respondent "tendered the amended return to the court as an accurate and reliable document, and relied on it in opposing DAI's motion for summary judgment on the counterclaim". **Ex.** 2, p. 7.

Both the memorandum opinion and journal entry found, however, that Sue Linda Jamison and Robert Carter were "not culpable". **Ex.** 1, p. 7. **Ex.** 2, p. 6 ¶12.

After recusal on November 8, 1996, Judge Russell selected Judge Sheppard to replace her. On January 17, 1997, Judge Sheppard heard the post-judgment motions that were pending before Judge Russell at the time of her recusal on November 8, 1996. Judge Sheppard denied that motion on the grounds that it should not be his responsibility to review the discretionary ruling of Judge Russell, stating: (**Ex.** Q, p. Q-5 **T.** p. 50)

> "It should not be the responsibility of this court, nor should this court indulge the prerogative of reviewing another trial judge's discretionary ruling".

The post-judgment motion was never heard on the merits.

Respondent filed another motion, after November 8, 1996, contending that Judge Russell should have recused herself before entering the May 31, 1996 memorandum opinion. That motion was heard on July 8, 1997. **Ex.** S. During that hearing, Judge Russell was shown copies of the memorandum opinion (**Ex.** 1) and the journal entry (**Ex.** 2). Some of the changes discussed above were underlined by Respondent's attorney, Mr.

Lancaster. Judge Russell acknowledged that if the underlined material in the journal entry was not contained within the memorandum opinion, it would represent a substantial modification, but also testified that while the journal entry is worded differently, she believed it was fairly encompassed within her memorandum opinion. **Ex.** S, pp. 35, 36. She stated further that if the language contained within the journal entry was not stated in the memorandum opinion, it was what she meant. **Ex.** S, pp. 36-37.

Judge Russell ruled on the dispute about the proposed journal entry on July 19, 1996, eight weeks (or more) after the ex parte conversation. During that hearing, Mr. Dunham explained the reasons for the changes in the journal entry as follows: (**Ex.** O, pp. 5, 6, 7, 10)

> (Mr. Dunham): To state the obvious, this is not a typical ruling on a typical issue with typical opposing counsel. It was an extraordinary ruling on extraordinary facts.
>
> As a consequence of that ruling, Mr. Duree is now, I think, **in real peril of losing his license to practice law**. Your Honor advised the lawyer disciplinary authorities in both Illinois and Missouri of the opinion because you sent them a copy of the opinion. And although I have not no inside information or outside information, it is difficult for me to believe that those disciplinary authorities are not going to regard this misconduct with the utmost seriousness.
>
> I think as a consequence of that, it is – we know from Mr. Duree's behavior before you that he is going to do everything he can – everything he can – to distort the record and confuse the Court of Appeals to get your decision

overturned.

This case illustrates quite painfully that he is willing to engage in misconduct over day-to-day issues in a lawsuit – manufactured evidence, lie to the Court – and there is no reason to think that his conduct is going to get any better, and I think reason to suspect that it may get worse, given what is at stake for him in the appeal of your ruling.

All our proposed journal entry does is pull together relevant findings and conclusions from your summary judgment decision and your two sanctions decisions and cite undisputed facts in the record, testimony that you heard either read to you or saw on videotape at the hearings in March and April of this year. All of the facts set forth in our proposed journal entry are in the record.*** (pp.5,6,7)

Based upon the record in this case, there is there is no question that all of the findings of fact and conclusions of law that we have proposed in our journal entry appear in the record, with ample support. As I said, all we're trying to do under these highly unusual circumstances is to **make sure that this record is buttoned up as tightly as possible to give Mr. Duree as little room as possible** to go through the machinations we can all predict he will go through before the Court of Appeals." (p. 10)

Judge Sheppard also overruled Respondent's motion that Judge Russell should have recused herself before issuing the May 31, 1996 memorandum opinion, **Ex.** S, p. 115, stating:

"As it is, the timing was absolutely terrible in terms of eroding confidence in the independent exercise of judgment on the part of Judge Russell.

However, as the succeeding judge who is called upon to rule on the succeeding motion, the occurrence does not cause me, in applying a **reasonable person's standard**, to find that a reasonable person would believe other than that Judge Russell made a deliberate, considered ruling without bias, without prejudice, and that David Duree's instant motion should be and is denied for those reasons."

The Kansas Supreme Court reviewed the case under an abuse of discretion standard with respect to the failure of Judge Russell to recuse herself and whether there was substantial competent evidence to support the sanction award and the order revoking Respondent's pro hac vice admission. **Subway Restaurant's, Inc. v Kessler**, 266 Kan. 433, 970 P.2d 526 (1998). In affirming the sanctions award and the order removing Respondent's admission pro hac vice, the Kansas Supreme Court stated, 266 Kan. 433, 446, 447:

"Moreover, Duree continues to advance the notion that there is nothing wrong with the 1989 amended return. He has argued many things on appeal, but he has not admitted that the amended return was essentially a false document.

* * * * * * * * * * * *

The 1989 amended tax return was evidence of Duree's misconduct.

* * * * * * * * * * * *

Our review of the voluminous record supports Judge Russell's conclusions.*** She concluded in her memorandum opinion on sanctions:

> 'It is the amended 1989 tax return that his at the heart of the motions at hand. Mr. Dunham charges that Mr. Duree manufactured the amended 1989 tax returns to serve as a basis for the defendants' fraud claim. After carefully considering the evidence, the court has reluctantly concluded that Mr. Dunham is correct.
>
> * * * * * * * * * * * *
>
> The inescapable conclusion from these facts is that Mr. Duree deliberately caused to be prepared a false tax return for use in this litigation.'"

Judge Russell gave a brief deposition in the proceedings below, on September 28, 1999. **Ex.** NNN. She testified that, if it were left up to her, she did not believe Respondent should be punished beyond the sanctions she had already awarded. **Ex.** NNN, pp. 4-5. In response to a question about whether Respondent poses a risk to the public, she stated: "I did not view what he did as an indication that he is fundamentally a dishonest person or a dishonest lawyer. I do not – nothing in the way he handled his case, for instance, would lead me to believe that he would cheat his clients or anything like that. I think he made a very serious error of judgment and presented evidence to the court that was false in an effort to bolster **a case that he personally believed in**, but, in my opinion, the evidence was clearly false and manufactured and I sanctioned it." **Ex.** NNN, pp. 5-7.

On cross examination, Informant elicited the following testimony (**Ex.** NNN, p. 8):

"**Q.** Is it fair to say that the fact concerning the income tax return was material to the overall proceedings but not a fact that was material to your ruling on the summary judgment motion?

A. Yeah, I think that's what I'm trying to say."

Judge James Logan is from Olathe, Kansas, the county seat of Johnson County. He sat on the United States Court of Appeals for the 10th Circuit for 21 years, until July 15, 1998. **Ex.** OOO, p. 7. Prior to that he was the dean of the University of Kansas Law School where he taught tax law. He has written articles on federal income taxation. He has always worked in the tax area and considers himself essentially a tax lawyer. **Ex.** OOO, pp. 8, 9. Doug Lancaster (Respondent's attorney) was one of his students at the University of Kansas Law School. Mr. Lancaster asked for his opinion before arguing before the Kansas Supreme Court. **Ex.** OOO, pp. 13-14. It is his opinion that there is nothing wrong with the amended tax return, and he recommended that Mr. Lancaster state that as his first point to the Kansas Supreme Court. **Ex.** OOO, pp. 20-21. The fact that the Missouri Board of Accountancy subsequently found no violations verified the opinion that he already held which was also consistent with the fact that the Internal Revenue Service accepted the 1989 amended tax return without objection and the subsequent testimony of Les Shapiro, the Director of Practice for the Internal Revenue Service, that there was nothing wrong with the amended tax return. **Ex.** OOO, pp. 24, 25, 26.

Mr. Dunham started telephoning and writing the Missouri Board of Accountancy shortly after Judge Russell's May 31, 1996 memorandum opinion. **Ex.** AA, pp. 1(a)-1(d). On January 28, 1999, the Missouri Board of Accountancy filed a complaint against Robert Seiffert, Mahlon Rubin and Rubin, Brown & Gornstein, charging that they subordinated their professional judgment to Respondent, **Ex.** AA, p. 11, ¶ 53, and by preparing false income tax returns, **Ex.** AA, p. 11 ¶36. The complaint attached copies of Judge Russell's May 31, 1996 memorandum opinion, as well as the December 18, 1998 opinion of the Kansas Supreme Court. **Ex.** AA, p. 8. ¶¶44, 45. The complaint also quoted from the Kansas Supreme Court opinion and referenced the affidavit of Ned Allen Ford, **Ex.** AA, p. 9 ¶ 47.

Mssrs. Seiffert and Rubin, through their attorneys, persuaded the Board of Accountancy to dismiss the complaint, without prejudice, to first investigate the charges. There had been no investigation before the complaint was filed. **T.** 48, **Ex.** AA, pp. 16, 20. The investigation was conducted under the terms of a letter agreement which would permit the Board of Accountancy to reopen the case if the investigation supported the charges. **T.** 48-49, **Ex.** AA, pp. 18-19.

Mssrs. Seiffert and Rubin then presented affidavits from Leslie S. Shapiro and William Walker to the Board of Accountancy. **T.** 50-51, **Ex.** BB, pp. 1-04 thru 1-11 and 1-14 thru 1-17. William Walker was a CPA with Price Waterhouse in St. Louis and Leslie S. Shapiro was the former Director of Practice for the Internal Revenue Service from 1973 through 1995. It was his responsibility to review more than 11,000 referrals involving charges against accountants and attorneys and to determine the ultimate

disposition of cases concerning their alleged non-compliance with the Internal Revenue Code and Internal Revenue Regulations. **Ex.** BB, p. 1-04. He was the Director of Practice for the Internal Revenue Service at the time the amended 1989 tax return was filed, during January, 1993. Both Leslie Shapiro and William Walker reviewed Rubin, Brown & Gornstein's five boxes of materials relating to the tax returns and met with Robert Seiffert and Mahlon Rubin to review these matters in detail. **Ex.** BB, p. 1-06 ¶ 11, and p. 1-15, ¶ 10.

Mr. Shapiro described the original 1989 return prepared by H & R Block as a "production line prepared return", which he considered to be the usual business practice of H & R Block in return preparation (but not in a pejorative sense). **Ex.** BB, p. 1-07, ¶ 14. Mr. Shapiro stated further (**Ex.** BB, p. 1-10, ¶ 22):

> "***In my judgment, there is no basis for the contention that the tax returns are false documents. This conclusion is based on balancing the circumstances surrounding the Respondents' deliberations, the dearth of reliable information, and the fact that only the IRS and the Department of Justice have jurisdiction to make that initial determination."

It was also the opinion of William Walker that Mssrs. Seiffert and Rubin did not prepare a false tax return or commit any false, fraudulent, misleading or deceptive act in preparing the amended tax return. **Ex.** BB, p. 1-15, ¶ 11.

Leslie Shapiro appeared in person, with Robert Seiffert, before the Board of Accountancy on April 19, 1999. The presentation lasted about two hours. **T.** 50, 51.

Before signing his affidavit, and appearing before the Board of Accountancy, Leslie Shapiro spent two days interviewing Robert Seiffert and Mahlon Rubin and reviewing their five boxes of materials relating to the tax return. **T.** 52, 53.

Mr. Seiffert had also worked with Joe Marchbein, the head of the tax department for Rubin, Brown & Gornstein in making the decision to prepare the amended tax return from the bank records. Mr. Marchbein had previously worked for the Internal Revenue Service for almost 25 years. **T.** 55.

After the presentation to the Board of Accountancy on April 19, 1999, two investigators from the Board of Accountancy, Ken Bishop, the Executive Director, and Dan Loring, the lead investigator, spent two days at Mr. Seiffert's office reviewing the five boxes of documents and interviewing Robert Seiffert, Mahlon Rubin and Joe Marchbein. **T.** 54-55.

The Board of Accountancy found no violation of its rules and regulations in the preparation of the amended tax return and closed its file on September 7, 1999, pursuant to a letter issued by Ken Bishop, Executive Director. That is a final decision in favor of Robert Seiffert, Mahlon Rubin and Rubin, Brown & Gornstein. **T.** 56, **Ex.** BB, p. 21. The Missouri statues, regulations and rules applicable to certified public accountants prohibit the preparation of false tax returns and prohibit preparation of tax returns which violate the Internal Revenue Code or Internal Revenue Regulations. **T.** 56-57.

About 14 months after the final decision of the Missouri Board of Accountancy, on November 20, 2000, Respondent filed a motion for relief from the Kansas judgment pursuant to K.S.A. 60-260, which permits the court to relieve a party from a final

judgment. Subsections 1, 2 and 3 require that such motions be filed within one year after the judgment was entered. Proceedings under Subsections 4-6 must be filed within a reasonable time.

Respondent's motion under K.S.A. 60-260 was filed under Subsections 4-6. The motion was based, in large part, on the affidavit of Leslie S. Shapiro and the September 7, 1999 ruling of the Missouri Board of Accountancy.

DAI and Mr. Dunham filed a motion for sanctions against Respondent contending the motion under K.S.A. 60-260 was filed in bad faith.

Mr. Dunham asked Judge Sheppard, who heard the K.S.A. 60-260 motion, to sanction Respondent and to write a special report to the Missouri Supreme Court advising that court of that ruling, stating (**Ex.** QQQ, pp. 22-24):

> **MR. DUNHAM:** "***And I want to close, your Honor, by briefly addressing the question you asked Mr. Duree about what effect this would have on him and the status of his license. Neither Mr. Wilkins nor I or our client have been involved in the disciplinary proceedings in Missouri. But I will represent as an officer of the court pursuant to my pro hac admission, this is my understanding, that after the Kansas Supreme Court unanimously affirmed your ruling and Judge Russell's ruling, that it advised the Missouri Supreme Court of that fact, that disciplinary proceedings were commenced, that there was some form of hearing before an advisory committee, which I gather is how it works in Missouri, and that that committee has the matter under submission, has not issued a recommendation about what should happen under the circumstances.

It seems to me to be extremely important and what I think everybody would agree really is a truly extraordinary set of circumstances in this case. A procedural history that is extraordinary and a finding by a state Supreme Court unanimously in really strikingly pointed language about the most serious forms of misconduct by a practicing lawyer, that **it's very important that the Missouri Supreme Court**, given its supervisory responsibility over members of the Missouri Bar and over the conducts of these disciplinary proceedings, **understand that Mr. Duree is at it again** and that he has come back here burdening the court and imposing substantial expense on my client with more frivolous and bad faith conduct.

THE COURT: And do you intend to make that report?

MR. DUNHAM: Well, your Honor, **we have requested** in our motion **that your Honor make the report**, which is consistent with what Judge Russell did when she imposed the sanctions initially, in which I understand is consistent with what the Kansas Supreme Court did after it affirmed the sanctions. We have never, neither Mr. Wilkins or I acting on behalf of Doctor's Associates, has ever filed a complaint with the Missouri disciplinary authorities. It's my understanding that the proceedings underway in Missouri are the result of communications from the Kansas judiciary.

THE COURT: As an officer of the court, you have the prerogative to report ethical violations to any tribunal having jurisdiction. And subsequently, that's why **I asked if you were going to take the initiative to report** what you perceive to be another occurrence of violation by Mr. Duree.

MR. DUNHAM: Your Honor, I believe you have accurately described my role or position as an officer of the court. And my response to your question is that my intention has been to draw a conclusion about my own conducts and obligations after your Honor rules on our motion."

Judge Sheppard denied Respondent's motion, on the grounds that it was not filed within a reasonable time, and also denied DAI's motion for sanctions, during the January 26, 2001 hearing. **Ex.** QQQ, pp. 49-51, 60-63. Mr. Dunham did not thereafter file a complaint with the disciplinary authorities in either Missouri or Illinois claiming that Respondent violated the Rules of Conduct by filing the K.S.A. 60-260 motion. Judge Sheppard's oral ruling was entered as a journal entry on June 6, 2001, and Respondent filed a notice of appeal on June 22, 2001. **Ex.** RRR. Respondent's opening brief in the Kansas Court of Appeals has not yet been filed, but is due during September, 2001.

The hearing panel issued its decision on May 7, 2001. At pages 1 and 2 of the decision, the panel listed the charges against Respondent, not its findings on those charges. In paragraph 18 on page 8, the hearing panel found that it was not able to conclude that Respondent was guilty of violating any of the rules with which Respondent was charged, 4-3.1, 4-3.3, 4-3.4, 4-4.1 and 4-8.4. In paragraph 19, the panel also ruled that the information should not be dismissed. The panel recommended that the Supreme Court review its findings and conclusions and consider assigning this matter to a special master to take further evidence on the underlying facts and/or the weight to be given to the Board of Accountancy's finding. Decision of the hearing panel, p. 9.

The Informant did not accept the findings of the hearing panel. Accordingly, the matter was transferred to this court on about July 6, 2001.

POINTS RELIED ON

I.

THE SUPREME COURT SHOULD ADOPT THE FINDING OF THE HEARING PANEL THAT IT COULD NOT CONCLUDE THAT RESPONDENT VIOLATED ANY OF THE RULES OF CONDUCT, OR ALTERNATIVELY ACCEPT ITS RECOMMENDATION TO APPOINT A SPECIAL MASTER, BECAUSE THE DOCTRINE OF COLLATERAL ESTOPPEL, UPON WHICH INFORMANT SOLELY RELIES, DOES NOT MANDATE A FINDING THAT RESPONDENT VIOLATED EITHER RULE 4-3.1 OR 4-8.4(C) IN THAT THE KANSAS COURT DID NOT DETERMINE ISSUES OF FACT WHICH REQUIRE THIS COURT TO DETERMINE THAT SUCH VIOLATIONS OCCURRED; THE CONCLUSION OF THE KANSAS COURT THAT THE 1989 AMENDED TAX RETURN IS A "FALSE" TAX RETURN (THE "HEART" OF THE MOTIONS IN KANSAS) IS BASED SOLELY UPON ITS DETERMINATION THAT THE AMENDED RETURN DOES NOT INCLUDE ALL THE GROSS RECEIPTS REPORTED ON THE WEEKLY SALES REPORTS (WISRS), WITHOUT DETERMINING IF THE AMENDED TAX RETURN CORRECTLY REPORTED TAXABLE INCOME, THE CORRECT AMOUNT OF TAXABLE INCOME, OR WHETHER THE ORIGINAL 1989 TAX RETURN IS CORRECT, WHERE THE AMENDED RETURN WAS PREPARED PURSUANT TO 26 U.S.C. § 446, WHICH PERMITS USE OF THE BANK DEPOSIT METHOD; THE MISSOURI BOARD OF ACCOUNTANCY, LESLIE SHAPIRO, THE DIRECTOR OF

PRACTICE FOR THE INTERNAL REVENUE SERVICE, WILLIAM WALKER AND JUDGE JAMES LOGAN OF THE U.S. COURT OF APPEALS FOR THE 10TH CIRCUIT (NOW RETIRED), ALL CONCLUDED THAT THE AMENDED RETURN WAS PROPERLY PREPARED UNDER 26 U.S.C. § 446; THE AMENDED RETURN, NOT THE ORIGINAL RETURN, WAS ACCEPTED BY THE IRS AS THE OPERABLE RETURN FOR 1989; UNDER THESE CIRCUMSTANCES THE RULING OF THE KANSAS COURT IS AN ERRONEOUS CONCLUSION OF LAW, NOT A FINDING OF FACT.

In re Caranchini, 956 S.W. 2d 910, 912 (Mo.Banc 1997)

Oates v. Safeco Ins. Co. of America, 583 S.W.2d 713, 719 (Mo.Banc 1979)

Kansas public Employees Retirement System v. Reimer & Koger Associates, Inc., 941 P.2d 1321, 1344 (Kan. 1997)

State ex rel Divn. of Family Services v. White, 952 S.W. 2d 716, 718 (Mo.App. 1997)

Restatement (Second) of Judgments § 28 (1982)

Am Home Assur. Co. v. Intl. Ins. Co., 219 A.D.2d 143, 147, 641 N.Y.S.2d 241 (N.Y. 1996)

Johnson v. United States, 576 F.2d 606, 614 (5th Cir. 1978)

Bruzewski v. United States, 181 F.2d 419 (3d Cir.)

St. Louis Union Trust Co. v. United States, 617 F.2d 1293, 1299 (8th Cir. 1980)

Antham v. Professional Air Traffic Controllers, 672 F.2d 706 (8th Cir. 1982)

United States v.Karlen, 645 F.2d 635, 639 (8th Cir. 1981)

26 U.S.C. § 446

Subway Restaurants, Inc. v. Kessler, 266 Kan. 433, 446, 970 P.2d 526 (Kan. 1998)

Rule 4-3.1

Rule 4-8.4(C)

K.S.A. 60-2007(b)

POINTS RELIED ON

II.

THE SUPREME COURT SHOULD ADOPT THE FINDING OF THE HEARING PANEL THAT IT COULD NOT CONCLUDE THAT THE RESPONDENT VIOLATED ANY OF THE RULE OF CONDUCT, OR ALTERNATIVELY ACCEPT ITS RECOMMENDATION TO APPOINT A SPECIAL MASTER, BECAUSE THE DOCTRINE OF COLLATERAL ESTOPPEL, UPON WHICH INFORMANT SOLELY RELIES, DOES NOT MANDATE A FINDING THAT RESPONDENT VIOLATED EITHER RULE 4-3.1 OR 4-8.4(C) IN THAT THE KANSAS COURT DID NOT HAVE SUBJECT MATTER JURISDICTION TO DETERMINE THAT THE 1989 AMENDED TAX RETURN IS A "FALSE" TAX RETURN (THE "HEART" OF THE MOTIONS IN KANSAS); ONLY A FEDERAL COURT, IN A PROPERLY FILED CASE CHARGING THE PREPARATION OF A FALSE TAX RETURN, MAY DETERMINE THAT A FEDERAL TAX RETURN IS A "FALSE" TAX RETURN; THE DOCTRINE OF COLLATERAL ESTOPPEL IS NOT TO BE RIGIDLY OR MECHANICALLY APPLIED IF IT WOULD RESULT IN AN UNJUST RESULT.

United States v. Scott, 37 F.3d 1564, 1583 (10th Cir. 1994)

Oates v. Safeco Ins. Co. of America, 583 S.W.2d 713, 720 (Mo.Banc 1979)

Christensen v. Ward, 916 F.2d 1462, 1474 (10th Cir. 1990), *cert denied*, 498 U.S. 999

In Re Brickell Investment Corp., 922 F.2d 696, 699-701 (11th Cir. 1991)

United States v. Koliboski, 732 F.2d 1328, 1329-30 (7th Cir. 1984)

United States v. Drefke, 707 F.2d 978 890-81 (8th Cir.), *cert denied sub nom*, 464 U.S. 942 (1983).

Fostvedt v. United States, 978 F.2d 1201, 1203 (10th Cir. 1992)

Doctor's Associates, Inc. v. Duree, 30 S.W. 3d 884 (Mo.App. 2000)

Doctor's Associates, Inc. v Duree, 745 N.E.2d 1270 (Ill.App. 2001)

26 U.S.C. §§ 7201, 7202, 7203, 7204, 7205, 7206, 7401 and 7402

26 U.S.C. § 1340

28 U.S.C. § 2201

28 U.S. C. § 7428

K.S.A. 60-2007

POINTS RELIED ON

III.

THE SUPREME COURT SHOULD ADOPT THE FINDINGS OF THE HEARING PANEL THAT IT COULD NOT CONCLUDE THAT THE RESPONDENT VIOLATED ANY OF THE RULES OF CONDUCT, OR ALTERNATIVELY ACCEPT ITS RECOMMENDATION TO APPOINT A SPECIAL MASTER, BECAUSE THE DOCTRINE OF COLLATERAL ESTOPPEL, UPON WHICH INFORMANT SOLELY RELIES, DOES NOT MANDATE A FINDING THAT RESPONDENT VIOLATED RULE 4-3.1 OR 4-8.4(C) IN THAT THE CONCLUSION OF THE KANSAS COURT THAT THE 1989 AMENDED TAX RETURN IS A "FALSE" TAX RETURN CONFLICTS WITH THE DETERMINATION BY THE MISSOURI BOARD OF ACCOUNTANCY, WHICH DETERMINED THAT THE ACCOUNTANTS WHO PREPARED THE AMENDED TAX RETURN DID NOT PREPARE A FALSE TAX RETURN, AND THE DOCTRINE OF COLLATERAL ESTOPPEL APPLIES EQUALLY TO THAT UNAPPEALED RULING OF A MISSOURI ADMINISTRATIVE AGENCY; CONFLICTING DECISIONS ON THE SAME ISSUE DO NOT REQUIRE THAT A SUBSEQUENT COURT APPLY EITHER RULING UNDER THE DOCTRINE OF COLLATERAL ESTOPPEL.

Bresnahan v. May Dept. Stores, Co., 726 S.W.2d 327, 329, 330 (Mo.Banc. 1987)

Rogers v. Ford Motor Co., 925 F.Supp. 1413, 1419 (N.D.Ind. 1996)

Oates v. Safeco Ins. Co. of America, 583 S.W.2d 713, 720 (Mo.Banc 1979)

State Farm v. Century Home Comp., Inc., 550 P.2d 1185, 1190, 1191 (Or. 1976)

Mocci v. Carr Engineering Assoc., 703 A.2d 686, 689 (N.J.App. 1997)

Danner v. Dillard Dept. Stores, Inc., 949 P.2d 680, 682, 683 (Ok. 1997)

Restatement (Second) of Judgments § 29 (1982)

POINTS RELIED ON

IV.

THE SUPREME COURT SHOULD ADOPT THE FINDINGS OF THE HEARING PANEL THAT IT COULD NOT CONCLUDE THAT THE RESPONDENT VIOLATED ANY OF THE RULES OF CONDUCT, OR ALTERNATIVELY ACCEPT ITS RECOMMENDATION TO APPOINT A SPECIAL MASTER, BECAUSE INFORMANT ABANDONED, BEFORE THE HEARING BOARD, ANY CLAIM THAT RESPONDENT VIOLATED RULE 4-3.1 BY ANY CONDUCT OTHER THAN THAT INVOLVING THE AMENDED TAX RETURN IN THAT RESPONDENT SHOULD BE AFFORDED AN OPPORTUNITY TO ADDRESS INFORMANT'S CURRENT CLAIM THAT RESPONDENT PROSECUTED THE KANSAS CASE WITHOUT A GOOD FAITH BELIEF THAT IT WAS VIABLE EVEN IF THE AMENDED TAX RETURN IS NOT A "FALSE" DOCUMENT.

Nelson v. Adams USA, Inc., 120 S. Ct. 1579 (2000)

Oates v. Safeco Ins. Co. of America, 583 S.W.2d 713, 720 (Mo.Banc 1979)

Subway Restaurants, Inc. v. Kessler, 266 Kan. 433, 446-47, 970 P.2d 526 (Kan. 1998)

POINTS RELIED ON

V.

THE SUPREME COURT SHOULD ADOPT THE FINDINGS OF THE HEARING PANEL THAT IT COULD NOT CONCLUDE THAT THE RESPONDENT VIOLATED ANY OF THE RULES OF CONDUCT, BECAUSE THE DOCTRINE OF COLLATERAL ESTOPPEL, UPON WHICH INFORMANT SOLELY RELIES, DOES NOT APPLY IN THAT RESPONDENT WAS NOT A AFFORDED A FAIR HEARING IN KANSAS; JUDGE RUSSELL, THE TRIAL COURT, ENGAGED IN AN EX PARTE CONVERSATION WITH JOHN GERSTLE, AN ATTORNEY REPRESENTING NANCY KESSLER ON BAD CHECK CHARGES, SEVEN DAYS OR MORE BEFORE ISSUING HER MAY 31, 1996 MEMORANDUM DECISION ON THE SANCTIONS ISSUES; JUDGE RUSSELL SUBSEQUENTLY ACKNOWLEDGED THAT THIS EX PARTE CONVERSATION CAUSED HER TO CONCLUDE THAT NANCY KESSLER HAD A "BIG TIME" COCAINE PROBLEM, WAS TAKING MONEY FROM HER SUBWAY SHOP CASH REGISTER (IN 1989) TO SUPPORT HER COCAINE HABIT, THAT RESPONDENT KNEW OF THE COCAINE PROBLEM AND THE USE OF CASH REGISTER MONEY FOR THAT PURPOSE AND ARRANGED FOR PREPARATION OF THE AMENDED 1989 TAX RETURN IN 1993, TO COVER UP NANCY KESSLER'S COCAINE PROBLEM; JUDGE RUSSELL TESTIFIED THAT THIS EX PARTE CONVERSATION PREVENTED HER FROM BEING FAIR AND IMPARTIAL

TOWARD RESPONDENT AT THE TIME THE MEMORANDUM OPINION WAS ISSUED ON MAY 31, 1996, WHEN THE DISPUTED JOURNAL ENTRY (JUDGMENT) WAS ISSUED ON JULY 19, 1996, AND ON NOVEMBER 8, 1996 WHEN RESPONDENT'S POST-JUDGMENT MOTION WAS SCHEDULED FOR HEARING; JUDGE RUSSELL RECUSED HERSELF ON NOVEMBER 8, 1996 BECAUSE SHE WAS UNABLE TO BE FAIR AND IMPARTIAL; NONE OF JUDGE RUSSELL'S CONCLUSIONS, BASED ON THE EX PARTE CONVERSATION ABOUT RESPONDENT ARE TRUE; THE MAY 31, 1996 MEMORANDUM OPINION DIRECTED MR. DUNHAM (DAI'S ATTORNEY) TO PREPARE THE JOURNAL ENTRY IN ACCORDANCE WITH THE MEMORANDUM OPINION; MR. DUNHAM PREPARED A PROPOSED JOURNAL ENTRY WITH NUMEROUS DELETIONS AND ADDITIONS TO THE FINDINGS IN THE MEMORANDUM OPINION, INCLUDING FINDINGS THAT RESPONDENT HAD PROSECUTED THE AMENDED COUNTERCLAIM IN BAD FAITH FOR REASONS UNRELATED TO THE AMENDED TAX RETURN; AT THE CONTESTED HEARING OF JULY 19, 1996, MR. DUNHAM ARGUED THAT THE CHANGES WERE NECESSARY TO "BUTTON UP THE RECORD" IN ANTICIPATION OF AN APPEAL BY RESPONDENT; JUDGE RUSSELL SIGNED THE JOURNAL ENTRY (JUDGMENT) PREPARED BY MR. DUNHAM ON JULY 19, 1996, JUDGE SHEPPARD REPLACED JUDGE RUSSELL AFTER HER RECUSAL, BUT REFUSED TO RULE ON THE PENDING POST TRIAL MOTION ON THE MERITS, DENYING IT ON THE

GROUNDS THAT IT WAS NOT HIS RESPONSIBILITY TO REVIEW JUDGE RUSSELL'S PREVIOUS RULINGS; IN A SEPARATE HEARING, JUDGE SHEPPARD DENIED RESPONDENT'S MOTION CONTENDING THAT JUDGE RUSSELL SHOULD HAVE RECUSED HERSELF AT THE TIME OF THE EX PARTE CONVERSATION, BEFORE ISSUING HER MEMORANDUM OPINION RULING; THE MAY 31, 1996 MEMORANDUM OPINION STATED, INCORRECTLY, THAT RESPONDENT VEHEMENTLY ARGUED THE AMENDED TAX RETURN IN OPPOSITION TO THE SUMMARY JUDGMENT MOTION (ON APRIL 13, 1995) AND DEMANDED THAT SANCTIONS BE ASSESSED AGAINST MR. DUNHAM, WHICH FINDINGS WERE DELETED FROM THE JOURNAL ENTRY (JUDGMENT) BY MR. DUNHAM AND REPLACED WITH A "FINDING" THAT RESPONDENT TENDERED THE AMENDED TAX RETURN TO THE COURT AS A DOCUMENT IN OPPOSING DAI'S MOTION FOR SUMMARY JUDGMENT, WHICH IS ALSO UNTRUE; THE ONLY USE OF THE AMENDED TAX RETURN IN THE KANSAS PROCEEDINGS WERE THE WRITTEN RESPONSES TO DAI'S MOTION FOR SUMMARY JUDGMENT PREPARED BY ROBERT CARTER AND SIGNED BY ROBERT CARTER AND SUE LINDA JAMISON (CO-COUNSEL WITH RESPONDENT) WHO WERE CORRECTLY FOUND "NOT CULPABLE" IN THE SANCTIONS HEARING; IN GRANTING THE MOTION FOR SUMMARY JUDGMENT, ON JUNE 9, 1995, JUDGE RUSSELL RULED THAT THE TAX RETURNS WERE IMMATERIAL, WHILE

IN THE MAY 31, 1996 MEMORANDUM OPINION, JUDGE RUSSELL RULED "BUT FOR THE FALSE RETURN, THE FRAUD COUNTERCLAIM COULD NOT HAVE BEEN FILED"; ONLY A SMALL AMOUNT OF THE DAMAGES CLAIMED WOULD HAVE BEEN AFFECTED BY THE TAX RETURNS, NOT THE FACT OF DAMAGES.

*In Re Caranchini*956 S.W. 2d 910 (Mo.Banc 1997)

Oates v. Safeco Ins. Co. of America, 583 S.W.2d 713, 720 (Mo.Banc 1979)

A to Z Assocs. v. Cooper, 161 Misc.2d 283, 289, 613 N.Y.S. 2d 512 (N.Y. 1993)

Hellesvig v. Hellesvig, 59 Or.App. 356, 360 650 P.2d 1072 (Or.App. 1982)

Kremer v. Chemical Construction Corp., 456 U.S. 461, 481 (1982)

Montana v. U.S., 440 U.S. 147, 164, n.11 (1979)

State Farm v. Century Home, 275 Or.97, 105, 550 P.2d 1185 (1976)

POINTS RELIED ON

VI.

THE SUPREME COURT SHOULD ADOPT THE FINDING OF THE HEARING PANEL THAT IT COULD NOT CONCLUDE THAT RESPONDENT VIOLATED ANY OF THE RULES OF CONDUCT, OR ALTERNATIVELY ACCEPT ITS RECOMMENDATION TO APPOINT A SPECIAL MASTER, BECAUSE THE PROCEEDINGS IN KANSAS WERE INITIATED AND PROSECUTED BY DAI AND MR. DUNHAM, RESPONDENT'S ANTAGONISTS, AS PROCEDURAL WEAPONS TO GAIN A TACTICAL LITIGATION ADVANTAGE, IN VIOLATION OF THE RULES OF CONDUCT WHICH PROVIDE THAT THE PURPOSE OF THE RULES CAN BE SUBVERTED WHEN THEY ARE INVOKED BY OPPOSING PARTIES AS PROCEDURAL WEAPONS.

Oates v.Safeco Ins. Co. of America, 583 S.W.2d 713, 720 (Mo.Banc 1979)

Jannotta v. Subway Sandwich Shops, Inc., et al., 125 F.3d 503 (7th Cir. 1997)

Jannotta v. Subway Sandwich Shops, et al., 225 F.3d 815 (7th Cir. 2000)

Cox v. Doctor's Associates, Inc., 613 N.E. 2d 1306 (Ill.App. 1993)

Yates v. Doctor's Associates, Inc., 549 N.E. 2d 1010 (Ill.App. 1990)

Doctor's Associates, Inc. v. Distajo, et al., 66 F.3d 438 (2nd Cir. 1995)

Doctor's Associates, Inc. v. Distajo, et al., 107 F.3d 126 (2nd Cir. 1997)

Doctor's Associates, Inc. v. Erik Hamilton, 150 F.3d 157 (2nd Cir. 1998)

Subway Equipment Leasing Corp. v. Forte and Sims, 169 F.3d 324 (5th Cir. 1999)

Subway Restaurants, inc., et al. v Riggs, 696 N.E. 2nd 733 (Ill.App. 1998)

Gerardo Mariani v. Doctor's Associates, Inc., et al., 983 F.2d 2nd 5 (1st Cir. 1993)

Rule 4, SCOPE

POINTS RELIED ON

VII

THE SUPREME COURT SHOULD ADOPT THE FINDING OF THE HEARING PANEL THAT IT COULD NOT CONCLUDE THAT THE RESPONDENT VIOLATED RULES OF CONDUCT 4-3.3, 4-3.4 AND 4-4.1 BECAUSE INFORMANT DOES NOT CHALLENGE THOSE FINDINGS IN ITS BRIEF BEFORE THIS COURT.

Rule 4-3.3

Rule 4-3.4

Rule 4-4.1

ARGUMENT

I.

THE SUPREME COURT SHOULD ADOPT THE FINDING OF THE HEARING PANEL THAT IT COULD NOT CONCLUDE THAT RESPONDENT VIOLATED ANY OF THE RULES OF CONDUCT, OR ALTERNATIVELY ACCEPT ITS RECOMMENDATION TO APPOINT A SPECIAL MASTER, BECAUSE THE DOCTRINE OF COLLATERAL ESTOPPEL, UPON WHICH INFORMANT SOLELY RELIES, DOES NOT MANDATE A FINDING THAT RESPONDENT VIOLATED EITHER RULE 4-3.1 OR 4-8.4(C) IN THAT THE KANSAS COURT DID NOT DETERMINE ISSUES OF FACT WHICH REQUIRE THIS COURT TO DETERMINE THAT SUCH VIOLATIONS OCCURRED; THE CONCLUSION OF THE KANSAS COURT THAT THE 1989 AMENDED TAX RETURN IS A "FALSE" TAX RETURN (THE "HEART" OF THE MOTIONS IN KANSAS) IS BASED SOLELY UPON ITS DETERMINATION THAT THE AMENDED RETURN DOES NOT INCLUDE ALL THE GROSS RECEIPTS REPORTED ON THE WEEKLY SALES REPORTS (WISRS), WITHOUT DETERMINING IF THE AMENDED TAX RETURN CORRECTLY REPORTED TAXABLE INCOME, THE CORRECT AMOUNT OF TAXABLE INCOME, OR WHETHER THE ORIGINAL 1989 TAX RETURN IS CORRECT, WHERE THE AMENDED RETURN WAS PREPARED PURSUANT TO 26 U.S.C. § 446, WHICH PERMITS USE OF THE BANK DEPOSIT METHOD; THE MISSOURI BOARD OF ACCOUNTANCY, LESLIE SHAPIRO, THE DIRECTOR OF

PRACTICE FOR THE INTERNAL REVENUE SERVICE, WILLIAM WALKER AND JUDGE JAMES LOGAN OF THE U.S. COURT OF APPEALS FOR THE 10TH CIRCUIT (NOW RETIRED), ALL CONCLUDED THAT THE AMENDED RETURN WAS PROPERLY PREPARED UNDER 26 U.S.C. § 446; THE AMENDED RETURN, NOT THE ORIGINAL RETURN, WAS ACCEPTED BY THE IRS AS THE OPERABLE RETURN FOR 1989; UNDER THESE CIRCUMSTANCES THE RULING OF THE KANSAS COURT IS AN ERRONEOUS CONCLUSION OF LAW, NOT A FINDING OF FACT.

The doctrine of collateral estoppel precludes parties from relitigating issues of ultimate fact that have previously been determined by a valid judgment. **In re Caranchini**, 956 S.W. 2d 910, 912 (Mo.Banc 1997).

DAI and Mr. Dunham argued, in Kansas, that the amended 1989 tax return was a "false" tax return because it did not list all the gross receipts in the WISRS, irrespective of whether it accurately reported taxable income (a loss) or whether the original 1989 tax return incorrectly reported taxable income. **Ex.** SSS, pp. 32, 39, 40, 42. DAI's two expert witnesses, Geoffrey Hazard and Ned Allen Ford, attached affidavits to the sanctions motions in Kansas. Geoffrey Hazard claims no expertise in tax or accounting matters. Ned Allen Ford did not review Kessler & Banks records, **Ex.** SSS, p. 40, did not calculate what he believed to be the correct taxable income or loss for 1989, p. 38, had no opinion about whether the original 1989 tax return accurately reported taxable income, p. 39, had been provided with insufficient information to determine if the amended 1989

return incorrectly stated a loss, p. 42, and acknowledged that he was not asked to determine if the amended tax return correctly stated a loss. **Ex.** SSS, p. 43.

Neither the memorandum opinion of May 31, 1996 (**Ex.** 1) nor the journal entry of July 19, 1996 (**Ex.** 2) determined that the amended 1989 tax return incorrectly reported a tax loss, or that the original 1989 tax return correctly reported taxable income, or the amount of taxable income of Kessler & Banks for 1989.

Ned Allen Ford did not testify in the Kansas sanctions proceedings, other than the excerpts of his pre-hearing deposition, which were read into the record by Respondent.

Judge Russell concluded that the amended 1989 tax return was a false tax return because it did not list as gross receipts all the gross receipts reflected in the WISRS. **Exs.** 1, 2.

The evidence on the alleged falsity of the 1989 amended tax return was the fact that it did not report all the gross receipts in the WISRS and Mr. Dunham's argument that this constituted a false tax return. At page 3 of the memorandum opinion (**Ex.** 1) Judge Russell ruled:

> "It is the amended 1989 tax return that is at the **heart of the motions at hand.** **Mr. Dunham charges** that Mr. Duree manufactured the amended 1989 tax returns to serve as a basis for the defendants' fraud claim. After carefully considering the evidence, the court has reluctantly concluded that Mr. Dunham is correct."

The original 1989 tax return is demonstrably incorrect. The panel was free to determine that fact from the ruling of the Missouri Board of Accountancy or from the

testimony of Robert Seiffert during the hearing below, or both. That was not an issue in the Kansas proceedings.

The hearing panel was also free to accept Mr. Seiffert's testimony in the hearing below, or to conclude from the ruling of the Missouri Board of Accountancy, that the amended 1989 tax return accurately, even conservatively, reported a tax loss of $17, 000. That issue was not determined in the Kansas proceedings.

See **State ex rel Divn. of Family Services v. White,** 952 S.W. 2d 716, 718 (Mo.App. 1997), where the court ruled:

> "Thus, whether White was the **child's father** was never an issued decided by the hearing officer, only whether White was the **child's presumed father**. For this reason, the issue in the Petition was not the same as the issue decided by the Administrative Hearing Officer. Therefore, barring the Appellant's Petition on grounds of collateral estoppel was improper." (emphasis added)

The amended tax return was prepared under the bank records method allowed by 26 U.S.C. § 446 which, by definition, would include circumstances where gross receipts and deductible expenses reflected in other documents would not be listed on the return. Unlike Missouri, Kansas still requires mutuality before applying collateral estoppel. **Kansas Public Employees Retirement System v Reimer & Koger Associates, Inc.,**941 P.2d 1321, 1344 (Kan.1997). The **KPERS** case, however, dealt with both mutual and non-mutual Defendants. With respect to those parties with mutuality, the KPERS court concluded that the doctrine of collateral estoppel does not apply to prior determinations of unmixed or pure questions of law. **KPERS v. Reimer & Koger**

Associates, Inc., 941 P.2d 1321, 1344-1346 (Kan. 1997). The KPERS case cited Restatement (Second) of Judgments § 28 (1982) as follows:

> "Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
>
> ….
>
> (2) The issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context **or otherwise avoid inequitable administration of the laws.**" (emphasis added)

See also **Am. Home Assur. Co. v. Intl. Ins. Co.,** 219 A.D.2d 143, 147, 641 N.Y.S.2d 241 (N.Y. 1996), where the court stated:

> "This court has interpreted the doctrine of collateral estoppel to mean that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated by the losing party in any future lawsuit, but that collateral estoppel does not apply to an unmixed or pure question of law. [Citations omitted.] That this case presents a purely legal issue constituted, in and of itself, a sufficient basis upon which to preclude application of collateral estoppel. Furthermore, it has been observed that **collateral estoppel is a flexible doctrine which can never be rigidly or mechanically applied.**"

See also **United States v. Karlen**, 645 F.2d 635, 639 (8th Cir. 1981) and **Antham v. Professional Air Traffic Controllers**, 672 F.2d 706 (8th Cir. 1982):

> "Because the doctrine of collateral estoppel is not rigidly applied, the focus is on whether the application of collateral estoppel will work an injustice on the party against whom estoppel is urged."

Antham v. Professional Air Traffic Controllers applied the doctrine of collateral estoppel to some issues, but not others, because the issue was not identical, stating [27]:

> "However, we reach a different conclusion as to the element of severe emotional distress. Proof of emotional distress is an essential element of the claim. This clearly was not an issue in the administrative proceeding. Where suits are not on the same cause of action, issue preclusion applies only to matters previously at issue and directly adjudicated. **St. Louis Union Trust Co. v. United States,** 617 F.2d 1293, 1299 (8th Cir. 1980)."

The memorandum opinion of May 31, 1996 (**Ex.** 1) refers to the rules of conduct, but does not specifically find that Respondent violated the rules. The journal entry prepared by Mr. Dunham, made specific findings that Respondent violated the rules of conduct. (**Ex.** 2, p. 4, ¶ 8).

Informant currently charges Respondent with violating Rules 4-3.1, for prosecuting the counterclaim in Kansas without a good faith belief in that claim and 4-8.4(c) for engaging in dishonest, fraudulent or deceitful conduct. The charge that

Respondent may have prosecuted the counterclaim in bad faith, for reasons other than use of the amended 1989 tax return, is addressed in Point IV.

With respect to any alleged use of the amended 1989 tax return, both charges require proof of Respondent's actual knowledge of the alleged falsity of the amended tax return.

Respondent argued before the Kansas Supreme Court that there was no evidence that he had knowledge of the alleged falsity of the alleged falsity of the tax return as required by the identical Kansas Rules of Professional Conduct.

The Kansas Supreme Court distinguished the level of knowledge required for finding a violation of K.S.A. 60-2007(b) (now repealed) with the level of knowledge required to establish a violation of the model rules of professional conduct, as follows. **Subway Restaurants, Inc. v Kessler**, 266 Kan. 433, 446, 970, P.2d 526 (Kan.1998):

"Knowledge and Intent

> Duree argues that to impose sanctions, findings that he acted intentionally, with actual knowledge that the amended return was false, are necessary. He asserts there was no evidence from which Judge Russell could infer that he had actual knowledge of the alleged falsity of the amended return. **Duree confuses the legal standards for sanctions under K.S.A. 60-2007(b) with the MRPC** [Model Rules of Professional Conduct].
>
> * * * * * * * * * * * *
>
> Judge Russell used the MRPC for guidance, but not as authority to sanction Duree.

> Duree also observes there is no way for us to conclude that he had 'actual knowledge of the alleged falsity of the Amended Return.' He makes this argument holding an L.L.M. in Taxation from Washington University School of Law (St. Louis).
>
> ***The 1989 amended tax return was evidence of Duree's misconduct."

The Kansas Supreme Court did not find it necessary to establish, in that action, the level of knowledge of the alleged falsity of the amended tax return needed to establish a violation of the rules of conduct. In the current case, however, the level of knowledge required to establish a violation of the rules of conduct is required. The Informant may not rely upon the doctrine of collateral estoppel to establish the level of knowledge required for a violation of the rules of conduct. See **State ex rel Divn. of Family Services v. White**, 952 S.W. 2d 716, 718 (Mo.App. 1997), cited above. It is not the same issue.

While the level of knowledge required to establish a violation of K.S.A. 60-2007(b) was never specifically articulated in the Kansas Supreme Court opinion, it appears that such knowledge can be established merely from the fact that there was an amended tax return (allegedly false) and that Respondent has a masters degree in tax law.

Since Respondent did not use the tax return in opposing the summary judgment motion, stating only that it was an evidentiary detail which was not outcome determinative, had not read it, and did not know its method of preparation, the level of knowledge of the alleged falsity to establish a violation of Rules 4-3.1 or 4-8.4(C) cannot be established by collateral estoppel. Respondent would not have known any more about

the alleged falsity in the amended tax return even if he possessed a PhD in tax law. Nor may this court presume that Respondent should have read the amended tax return before conducting oral argument against the summary judgment motion on April 13, 1995. Respondent did not believe it was significant to that argument, had not read the amended tax return, and did not know of its method of preparation. Judge Russell concluded that the tax returns were immaterial to the summary judgment motion. **Ex.** F, p. 4. During her September 28, 1999 deposition in the current matter, Judge Russell reaffirmed her position that while she considered the amended tax return to be material to the overall proceedings, it was not material to the summary judgment motion. **Ex.** NNN, p. 8.

Respondent's only alleged use of the amended tax return in the summary judgment motion proceedings was to state, during oral argument, that it was an evidentiary detail which was not outcome determinative.

While Robert Carter prepared the written responses to the summary judgment motion, referring to the amended tax return in response to ¶¶ 143 and 159, and he and Sue Linda Jamison signed and filed those pleadings, they were correctly found "not culpable" for doing so in the sanctions proceedings. **Respondent may not be held vicariously liable for the conduct of Robert Carter and Sue Linda Jamison who themselves, were found "not culpable".**

Moreover, Respondent did not use the amended tax return for any other part of the case. As a result of the summary judgment ruling, the case was never heard. The counterclaim was disposed of by the summary judgment ruling. The complaint of DAI

and affiliated parties was recently dismissed, for failure to prosecute. **Exs.** QQQ and RRR.

In Re: Caranchini, 956 S.W.2d 910 (Mo.Banc. 1997) cites **Oates v. Safeco Ins. Co. of America**, 583 S.W.2d 713, 719 (Mo.Banc. 1979), which at 720 quotes **Johnson v. United States**, 576 F.2d 606, 614 (5th Cir. 1978) and **Bruzewski v. United States**, 181 F.2d 419 (3d Cir.) cert. denied 340 U.S. 865 (1950), as follows:

> "A party who has had one fair and full opportunity to prove a claim and has failed in that effort, should not be permitted to go to trial on merits of that claim a second time. Both orderliness and reasonable time saving in judicial administration require that this is so **unless some overriding consideration of fairness to a litigant dictates a different result in the circumstances of a particular case.** (Emphasis original)."

Overriding considerations of fairness apply in the case at hand. Respondent did not argue the amended tax return in support of any position in Kansas, stating only that it was an evidentiary detail which was not outcome determinative. Respondent may not be held vicariously liable for the pleadings prepared and filed by Robert Carter and Sue Linda Jamison, who were themselves found not culpable. The conclusion of Judge Russell that the amended 1989 tax return is a "false" tax return is based simply upon the fact that it does not include all the gross receipts reflected on the WISRS. DAI and Mr. Dunham offered no expert testimony, in Kansas, in support of their claim that the amended tax return is a false document. The amended tax return was prepared under 26 U.S.C. § 446, using the bank records method.

Judge Russell had previously concluded, at the urging of DAI and Mr. Dunham, that the financial records of Kessler & Banks were so poor that they could not possibly prove that their losses resulted from the alleged fraud of DAI, and granted summary judgment on that basis. **Ex.** F.

Arguably, the doctrine of collateral estoppel or the doctrine of the law of the case, would have precluded Judge Russell from subsequently determining that among all of the financial records of Kessler & Banks, the WISRS are in fact accurate and reliable (while all of their other financial records are not) and using that as a basis for finding that the amended tax return is a false document.

It was inconsistent for Judge Russell to conclude that the records were so poor that summary judgment would be entered on those grounds, then find that the WISRS were reliable and accurate in determining whether the amended tax return is a false document.

More importantly, the amended tax return was prepared from the bank records, not the WISRS, because Mr. Seiffert found the WISRS and control sheets unreliable and incomplete and inaccurate in the same fashion that all the financial records (including the WISRS and control sheets) of Kessler & Banks have been found to be unreliable, inaccurate and incomplete in the summary judgment ruling.

Moreover, Mr. Seiffert's opinion on these matters is supported by the opinion of Judge James Logan, who has experience in tax matters, Leslie S. Shapiro, the Director of Practice of the Internal Revenue Service for 23 years, including the time period when the amended tax return was filed, the Internal Revenue Service which accepted the amended

tax return, William Walker, a CPA with Price Waterhouse, and the Missouri Board of Accountancy.

Judge Russell's determination that the amended tax return, under these circumstances, is simply an erroneous, pure conclusion of law which is not binding on this court under the principles of collateral estoppel. The issue of Respondent's knowledge and intent in Kansas is also not the same as the issue presented here.

II.

THE SUPREME COURT SHOULD ADOPT THE FINDING OF THE HEARING PANEL THAT IT COULD NOT CONCLUDE THAT THE RESPONDENT VIOLATED ANY OF THE RULE OF CONDUCT, OR ALTERNATIVELY ACCEPT ITS RECOMMENDATION TO APPOINT A SPECIAL MASTER, BECAUSE THE DOCTRINE OF COLLATERAL ESTOPPEL, UPON WHICH INFORMANT SOLELY RELIES, DOES NOT MANDATE A FINDING THAT RESPONDENT VIOLATED EITHER RULE 4-3.1 OR 4-8.4(C) IN THAT THE KANSAS COURT DID NOT HAVE SUBJECT MATTER JURISDICTION TO DETERMINE THAT THE 1989 AMENDED TAX RETURN IS A "FALSE" TAX RETURN (THE "HEART" OF THE MOTIONS IN KANSAS); ONLY A FEDERAL COURT, IN A PROPERLY FILED CASE CHARGING THE PREPARATION OF A FALSE TAX RETURN, MAY DETERMINE THAT A FEDERAL TAX RETURN IS A "FALSE" TAX RETURN; THE DOCTRINE OF COLLATERAL ESTOPPEL IS NOT TO BE RIGIDLY OR MECHANICALLY APPLIED IF IT WOULD RESULT IN AN UNJUST RESULT.

Leslie S. Shapiro stated the following in his affidavit (**Ex.** BB, p. 1-10 ¶ 22):

> "***The IRS reviewed the returns and accepted them as filed. In my judgment, there is no basis for the contention that the tax returns are false documents. This conclusion is based on balancing the circumstances surrounding the Respondents' deliberations, the dearth of reliable information, and the fact that

only the IRS and the Department of Justice have jurisdiction to make that initial determination."

Statutory and case law supports Mr. Shapiro's opinion. False federal tax returns and false statements in tax returns and to the Internal Revenue Service are governed by 26 U.S.C. §§ 7201, 7202, 7203, 7204, 7205, 7206, 7401 and 7402. Criminal penalties are imposed for violations. Jurisdiction lies exclusively with the federal courts. 26 U.S.C. §§ 7401, 7402, 28 U.S.C. § 1340. **United States v. Scott**, 37 F.3d 1564, 1583 (10th Cir. 1994):

> "…federal courts have exclusive jurisdiction over crimes established by the Internal Revenue Code."

Accord, **Christensen v. Ward**, 916 F.2d 1462, 1474 (10th Cir. 1990), *cert denied*, 498 U.S. 999; **United States v. Koliboski** , 732 F.2d 1328, 1329-30 (7th Cir. 1984); **United States v. Drefke**, 707 F.2d 978 890-81 (8th Cir.), *cert denied sub nom,* 464 U.S. 942 (1983).

Even the federal courts could not **declare** that the amended 1989 return was a false tax return. The declaratory judgment act specifically prohibits declaratory judgments in matters relating to taxes. 28 U.S.C. § 2201, 26 U.S.C. § 7428. There are some exceptions which are not relevant here. **Fostvedt v. United States**, 978 F.2d 1201, 1203 (10th Cir. 1992). A criminal case in the federal court, specifically raising these issues, is required. The defendant is entitled to a jury trial.

Even (non-Article III) bankruptcy courts are without subject matter jurisdiction to determine issues under the Internal Revenue Code. **In Re Brickell Investment Corp.**, 922 F.2d 696, 699-701 (11th Cir. 1991).

DAI filed actions to register the Kansas judgment in Missouri and Illinois under those states' Uniform Registration of Foreign Judgments Acts. Respondent opposed those registrations. Only three grounds are recognized for refusing to give full faith and credit to a sister state's judgment, (1) lack of jurisdiction over the subject matter; (2) failure to give due notice to the judgment debtor; or (3) fraud in the concoction or procurement of the judgment. **Doctor's Associates, Inc. v. Duree**, 30 S.W.3d 884 (Mo.App.2000); **Doctor's Associates, Inc. v. Duree**, 745 N.E.2d 1270 (Ill.App.2001). Both cases held that the Kansas courts had subject matter jurisdiction to impose sanctions upon Respondent pursuant to K.S.A. 60-2007 (now repealed). Since the Kansas courts had subject matter jurisdiction to impose sanctions, the Missouri and Illinois Appellate Courts reasoned, it was not necessary to determine if the Kansas courts had subject matter jurisdiction to determine whether the amended tax return was a false document.

Mr. Dunham's inclusion of paragraphs 9 and 10 in the journal entry (**Ex.** 2, pp. 4,5) was useful to DAI in this respect, since those paragraphs hold that Respondent prosecuted the counterclaim for fraud in bad faith for reasons other than use of the amended tax return. It appears that the foreign judgment registration courts concluded that since the Kansas courts had subject matter jurisdiction to impose sanctions, and since the sanctions award could have been based on grounds other than a determination that the

amended tax return was false, the requirements for registering the Kansas judgment in Missouri and Illinois were met.

In the current case, however, Respondent submits that it is necessary for this court to determine whether the Kansas courts had subject matter jurisdiction to determine that the amended tax return was a false tax return. The issue here is not registration of the foreign judgment, but application of the doctrine of collateral estoppel to other claims. Respondent respectively submits that it is clear that the Kansas courts did not have subject matter jurisdiction to determine that the amended tax return was a false tax return.

The fact that the Kansas courts did not have subject matter jurisdiction to determine that the amended tax return is a false tax return provides the necessary overriding consideration of fairness which precludes a rigid and mechanical application of the principle of collateral estoppel in this case. **Oates v. Safeco Ins. Co. of America**, 583 S.W.2d 713, 720 (Mo.Banc 1979).

III.

THE SUPREME COURT SHOULD ADOPT THE FINDINGS OF THE HEARING PANEL THAT IT COULD NOT CONCLUDE THAT THE RESPONDENT VIOLATED ANY OF THE RULES OF CONDUCT, OR ALTERNATIVELY ACCEPT ITS RECOMMENDATION TO APPOINT A SPECIAL MASTER, BECAUSE THE DOCTRINE OF COLLATERAL ESTOPPEL, UPON WHICH INFORMANT SOLELY RELIES, DOES NOT MANDATE A FINDING THAT RESPONDENT VIOLATED RULE 4-3.1 OR 4-8.4(C) IN THAT THE CONCLUSION OF THE KANSAS COURT THAT THE 1989 AMENDED TAX RETURN IS A "FALSE" TAX RETURN CONFLICTS WITH THE DETERMINATION BY THE MISSOURI BOARD OF ACCOUNTANCY, WHICH DETERMINED THAT THE ACCOUNTANTS WHO PREPARED THE AMENDED TAX RETURN DID NOT PREPARE A FALSE TAX RETURN, AND THE DOCTRINE OF COLLATERAL ESTOPPEL APPLIES EQUALLY TO THAT UNAPPEALED RULING OF A MISSOURI ADMINISTRATIVE AGENCY; CONFLICTING DECISIONS ON THE SAME ISSUE DO NOT REQUIRE THAT A SUBSEQUENT COURT APPLY EITHER RULING UNDER THE DOCTRINE OF COLLATERAL ESTOPPEL.

The Missouri Board of Accountancy charged Robert Seiffert, Mahlon Rubin and Rubin, Brown & Gornstein with preparation of false tax return for Kessler & Banks, and subordinating their professional judgment to Respondent's wishes, on the basis of Judge

Russell's May 31, 1996 memorandum opinion and the decision of the Kansas Supreme Court. **Ex.** AA, p. 11 ¶¶ 53, 56.

The Board of Accountancy dismissed those charges, without prejudice, to conduct an investigation, **Ex.** AA, pp. 16, 20, then dismissed the charges completely, in a final ruling, after the investigation was completed, finding no violations of the rules applicable to certified public accountants, which would include any violations of the Internal Revenue Code or Internal Revenue Regulations. **T.** 56, **Ex.** AA, p. 21.

The principles of collateral estoppel apply to the decision of the Missouri Board of Accountancy, as an unappealed decision of a Missouri administrative agency. **Bresnahan v. May Dept. Stores, Co.**, 726 S.W.2d 327, 329, 330 (Mo.Banc. 1987).

The complaint filed by the Missouri Board of Accountancy was based entirely on the rulings in Kansas. The Missouri Board of Accountancy's decision, however, conflicts with the decision in Kansas. A necessary element of the board's determination that there were no violations is that the amended tax return is not a false tax return.

The hearing panel recommended the appointment of a special master to sort through the differences in the ruling by the Missouri Board of Accountancy and the rulings in Kansas.

In **Rogers v. Ford Motor Co.**, 925 F.Supp. 1413, 1419 (N.D.Ind. 1996) the court refused to apply the doctrine of collateral estoppel, stating:

"**Confidence in the correctness of the earlier determination** is fundamental to the principles of collateral estoppel, based at least in part upon a

conviction that, even if the issue were relitigated, the result would not change. See **Restatement (Second) of Judgments** § 29 (1982)." (emphasis added)

Restatement (Second) of Judgments § 28(5)(c) provides that the doctrine of collateral estoppel does not apply to issues decided in prior litigation where "other compelling circumstances make it appropriate that the party be permitted to relitigate the issue." See **State Farm v. Century Home Comp., Inc.**, 550 P.2d 1185, 1190, 1191 (Or. 1976) where the Oregon Supreme Court refused to apply the doctrine of collateral estoppel where there were **inconsistent prior decisions** and where new evidence was obtained after the initial decision on which the claim of collateral estoppel was premised.

See also **Mocci v. Carr Engineering Assoc.**, 703 A.2d 686, 689 (N.J.App. 1997) where the court found that new evidence which could likely lead to a different result, or where the prior determination was plainly wrong, precludes application of the doctrine of collateral estoppel to facts determined in the prior proceeding, relying on **Restatement (Second) of Judgments** § 29, comment j, entitled "Other Circumstances".

In **Danner v. Dillard Dept. Stores, Inc.**, 949 P.2d 680, 682, 683 (Ok. 1997) the Oklahoma Supreme Court refused to apply the doctrine of collateral estoppel because a witness in the first proceeding had changed her testimony and because of new facts which were not known and could not have been discovered before the initial hearing.

These circumstances preclude a rigid and mechanical application of the principles of collateral estoppel to the Kansas judgment. Overriding considerations of fairness apply here. **Oates v. Safeco Ins. Co. of America**, 583 S.W.2d 713, 720 (Mo.Banc 1979).

IV.

THE SUPREME COURT SHOULD ADOPT THE FINDINGS OF THE HEARING PANEL THAT IT COULD NOT CONCLUDE THAT THE RESPONDENT VIOLATED ANY OF THE RULES OF CONDUCT, OR ALTERNATIVELY ACCEPT ITS RECOMMENDATION TO APPOINT A SPECIAL MASTER, BECAUSE INFORMANT ABANDONED, BEFORE THE HEARING BOARD, ANY CLAIM THAT RESPONDENT VIOLATED RULE 4-3.1 BY ANY CONDUCT OTHER THAN THAT INVOLVING THE AMENDED TAX RETURN IN THAT RESPONDENT SHOULD BE AFFORDED AN OPPORTUNITY TO ADDRESS INFORMANT'S CURRENT CLAIM THAT RESPONDENT PROSECUTED THE KANSAS CASE WITHOUT A GOOD FAITH BELIEF THAT IT WAS VIABLE EVEN IF THE AMENDED TAX RETURN IS NOT A "FALSE" DOCUMENT.

Informant argued that the hearing panel first found that Respondent violated the rules of conduct, at pages 1 and 2 of the decision, then contrarily found that it could not conclude that Respondent was guilty of violating the rule, at page 8. **Informant's brief**, p.16. Respondent Respectively submits that Informant has misinterpreted pages 1 and 2 of the hearing panel decision. The hearing panel was merely reciting the charges against Respondent at pages 1 and 2, not deciding those charges. In paragraph 18, on page 8, the hearing panel determined that it could not conclude that Respondent was guilty of violating any of the rules of conduct.

At page 25 of its brief, Informant contends that the issue of the **lawfulness** of the 1989 amended partnership tax return prepared by Mr. Seiffert was never before the Kansas courts. It seems that Informant is suggesting that it would possible for the 1989 amended tax return to be "lawful" but false. Informant has cited no authority for that position. Respondent respectfully submits that he is unaware of any circumstances under which a tax return could be both **lawful and false** at the same time.

Informant's position seems contrary to the May 31, 1996 memorandum opinion of Judge Russell, in which she stated that (**Ex.** 1, p. 3):

> **"It is the amended 1989 tax return that is at the heart of the motions at hand."**

The Kansas Supreme Court quoted that section of the memorandum opinion, and also stated:

> **"The 1989 amended tax return was evident of Duree's misconduct"**

Subway Restaurants, Inc. v. Kessler, 266 Kan. 433, 446-47, 970 P.2d 526 (Kan. 1998).

Significantly, Informant contends, at page 25 of its brief, that it was not necessary that the courts decide that the amended return was "false" in the sense that it could be so characterized by application of IRS regulations and statutes.

Of course, Respondent didn't use the amended tax return in any way in Kansas, other than to comment during oral argument that it was an evidentiary detail which was not outcome determinative. Apparently Judge agreed, finding that the amended tax return was not material to the summary judgment proceeding.

More significantly, during the proceedings below, Respondent inquired whether Informant interpreted the Information as containing a claim that Respondent prosecuted the counterclaim in bad faith for reasons other than (alleged) use of the amended tax returns. **T.** 219, 220. Respondent was prepared to go through the summary judgment pleadings, which rise to two feet in height when stacked one upon the other (**T.** 299), if Informant intended that such claim was asserted. Mr. Graham, the chairperson of the hearing panel, stated that he did not believe that issue was claimed, and Informant's trial counsel, Mr. Klinckhardt agreed. **T.** 220.

Any claim that Respondent should be disciplined for prosecuting the counterclaim for fraud in bad faith for reasons other than alleged use of the tax return were abandoned (actually never filed) in this case. Fundamental due process requires that Respondent have notice of such claim, and an opportunity to oppose it, in an evidentiary hearing, before it is argued before this court. **Nelson v. Adams USA, Inc.**, 120 S. Ct. 1579 (2000).

Respondent is not certain of the argument that is being advanced by Informant on pp. 25-26 of its Brief. Respondent respectively submits that the charges against him have been somewhat of a moving target since they were initiated by DAI and Mr. Dunham in 1995. It is also possible that Informant is suggesting that the Kansas courts did not determine that the amended tax return was "false", but was simply not reliable or correct. See **Informant's brief**, p. 25, line 15.

The Kansas courts, however, specifically declared the amended tax return to be false. **Ex.** 1, p. 3,and the Kansas Supreme Court opinion.

Moreover, the Information alleges as follows:

"9. In the Kansas litigation Respondent and his clients, through the testimony of the CPA, relied upon the amended tax return in arguing that the Subway shop actually lost money during its operation."

Judge Russell's "finding" that Respondent vehemently argued against the summary judgment motion on the basis of the amended tax return, and demanded sanctions against Mr. Dunham on the same basis (**Ex.** 1, p. 3) is clearly, flatly, contrary to Respondent's oral argument opposing summary judgment, all of which is in the record. **Ex.** D. Respondent's only "use" of the amended tax return was his comment during the oral argument against the summary judgment motion that it was an evidentiary detail which was not outcome determinative.

Mr. Dunham deleted those "findings" of Judge Russell from the journal entry, and replaced them with a "finding" that Respondent tendered the amended return to the court as an accurate and reliable document and relied on it in opposing DAI's motion for summary judgment on the counterclaim. **Ex.** 2, p. 4, ¶ 7. That isn't true either.

The only use of the amended tax return in the case related to the summary judgment motion and was set forth in the written pleadings opposing the summary judgment motion prepared by Robert Carter, signed by Robert Carter and Sue Linda Jamison and filed by Sue Linda Jamison. Respondent is not pointing fingers at them, as the Kansas Supreme Court apparently believed. Respondent contends that the Kansas courts correctly found that Robert Carter and Sue Linda Jamison were not culpable. **Ex.** 1, p. 7, **Ex.** 2, p. 6, ¶ 12.

Respondent may not be held vicariously liable for the conduct of Robert Carter and Sue Linda Jamison, in preparing, signing and filing those pleadings, when Robert Carter and Sue Linda Jamison were themselves not culpable. The principles of collateral estoppel do not require otherwise.

These circumstances preclude a rigid and mechanical application of the principles of collateral estoppel to the Kansas judgment. Overriding considerations of fairness apply here. **Oates v. Safeco Ins. Co. of America**, 583 S.W.2d 713, 720 (Mo.Banc 1979).

V.

THE SUPREME COURT SHOULD ADOPT THE FINDINGS OF THE HEARING PANEL THAT IT COULD NOT CONCLUDE THAT THE RESPONDENT VIOLATED ANY OF THE RULES OF CONDUCT, BECAUSE THE DOCTRINE OF COLLATERAL ESTOPPEL, UPON WHICH INFORMANT SOLELY RELIES, DOES NOT APPLY IN THAT RESPONDENT WAS NOT A AFFORDED A FAIR HEARING IN KANSAS; JUDGE RUSSELL, THE TRIAL COURT, ENGAGED IN AN EX PARTE CONVERSATION WITH JOHN GERSTLE, AN ATTORNEY REPRESENTING NANCY KESSLER ON BAD CHECK CHARGES, SEVEN DAYS OR MORE BEFORE ISSUING HER MAY 31, 1996 MEMORANDUM DECISION ON THE SANCTIONS ISSUES; JUDGE RUSSELL SUBSEQUENTLY ACKNOWLEDGED THAT THIS EX PARTE CONVERSATION CAUSED HER TO CONCLUDE THAT NANCY KESSLER HAD A "BIG TIME" COCAINE PROBLEM, WAS TAKING MONEY FROM HER SUBWAY SHOP CASH REGISTER (IN 1989) TO SUPPORT HER COCAINE HABIT, THAT RESPONDENT KNEW OF THE COCAINE PROBLEM AND THE USE OF CASH REGISTER MONEY FOR THAT PURPOSE AND ARRANGED FOR PREPARATION OF THE AMENDED 1989 TAX RETURN IN 1993, TO COVER UP NANCY KESSLER'S COCAINE PROBLEM; JUDGE RUSSELL TESTIFIED THAT THIS EX PARTE CONVERSATION PREVENTED HER FROM BEING FAIR AND IMPARTIAL

TOWARD RESPONDENT AT THE TIME THE MEMORANDUM OPINION WAS ISSUED ON MAY 31, 1996, WHEN THE DISPUTED JOURNAL ENTRY (JUDGMENT) WAS ISSUED ON JULY 19, 1996, AND ON NOVEMBER 8, 1996 WHEN RESPONDENT'S POST-JUDGMENT MOTION WAS SCHEDULED FOR HEARING; JUDGE RUSSELL RECUSED HERSELF ON NOVEMBER 8, 1996 BECAUSE SHE WAS UNABLE TO BE FAIR AND IMPARTIAL; NONE OF JUDGE RUSSELL'S CONCLUSIONS, BASED ON THE EX PARTE CONVERSATION ABOUT RESPONDENT ARE TRUE; THE MAY 31, 1996 MEMORANDUM OPINION DIRECTED MR. DUNHAM (DAI'S ATTORNEY) TO PREPARE THE JOURNAL ENTRY IN ACCORDANCE WITH THE MEMORANDUM OPINION; MR. DUNHAM PREPARED A PROPOSED JOURNAL ENTRY WITH NUMEROUS DELETIONS AND ADDITIONS TO THE FINDINGS IN THE MEMORANDUM OPINION, INCLUDING FINDINGS THAT RESPONDENT HAD PROSECUTED THE AMENDED COUNTERCLAIM IN BAD FAITH FOR REASONS UNRELATED TO THE AMENDED TAX RETURN; AT THE CONTESTED HEARING OF JULY 19, 1996, MR. DUNHAM ARGUED THAT THE CHANGES WERE NECESSARY TO "BUTTON UP THE RECORD" IN ANTICIPATION OF AN APPEAL BY RESPONDENT; JUDGE RUSSELL SIGNED THE JOURNAL ENTRY (JUDGMENT) PREPARED BY MR. DUNHAM ON JULY 19, 1996; JUDGE SHEPPARD REPLACED JUDGE RUSSELL AFTER

HER RECUSAL, BUT REFUSED TO RULE ON THE PENDING POST TRIAL MOTION ON THE MERITS, DENYING IT ON THE GROUNDS THAT IT WAS NOT HIS RESPONSIBILITY TO REVIEW JUDGE RUSSELL'S PREVIOUS RULINGS; IN A SEPARATE HEARING, JUDGE SHEPPARD DENIED RESPONDENT'S MOTION CONTENDING THAT JUDGE RUSSELL SHOULD HAVE RECUSED HERSELF AT THE TIME OF THE EX PARTE CONVERSATION, BEFORE ISSUING HER MEMORANDUM OPINION RULING; THE MAY 31, 1996 MEMORANDUM OPINION STATED, INCORRECTLY, THAT RESPONDENT VEHEMENTLY ARGUED THE AMENDED TAX RETURN IN OPPOSITION TO THE SUMMARY JUDGMENT MOTION (ON APRIL 13, 1995) AND DEMANDED THAT SANCTIONS BE ASSESSED AGAINST MR. DUNHAM, WHICH FINDINGS WERE DELETED FROM THE JOURNAL ENTRY (JUDGMENT) BY MR. DUNHAM AND REPLACED WITH A "FINDING" THAT RESPONDENT TENDERED THE AMENDED TAX RETURN TO THE COURT AS A DOCUMENT IN OPPOSING DAI'S MOTION FOR SUMMARY JUDGMENT, WHICH IS ALSO UNTRUE; THE ONLY USE OF THE AMENDED TAX RETURN IN THE KANSAS PROCEEDINGS WERE THE WRITTEN RESPONSES TO DAI'S MOTION FOR SUMMARY JUDGMENT PREPARED BY ROBERT CARTER AND SIGNED BY ROBERT CARTER AND SUE LINDA JAMISON (CO-COUNSEL WITH RESPONDENT) WHO WERE CORRECTLY FOUND "NOT CULPABLE" IN THE SANCTIONS HEARING; IN GRANTING THE MOTION FOR SUMMARY

JUDGMENT, ON JUNE 9, 1995, JUDGE RUSSELL RULED THAT THE TAX RETURNS WERE IMMATERIAL, WHILE IN THE MAY 31, 1996 MEMORANDUM OPINION, JUDGE RUSSELL RULED "BUT FOR THE FALSE RETURN, THE FRAUD COUNTERCLAIM COULD NOT HAVE BEEN FILED"; ONLY A SMALL AMOUNT OF THE DAMAGES CLAIMED WOULD HAVE BEEN AFFECTED BY THE TAX RETURNS, NOT THE FACT OF DAMAGES.

In Re Caranchini, 956 S.W. 2d 910 (Mo.Banc 1997) requires identity of issues and a fair opportunity to litigate those issues, before determinations of fact in a previous case are considered binding on the parties in the current case under the principle of collateral estoppel.

The identity of issue requirement is discussed under Point I. Respondent contends that the issue in Kansas, under K.S.A. 60-2007, is not the same issue presented here under the rules of conduct, because of the different standard applicable to Respondent's knowledge and intent that was identified by the Kansas Supreme Court.

Collateral estoppel also does not apply if Respondent was not afforded a fair hearing in Kansas.

Respondent could not challenge the internal fairness (as opposed to extrinsic fraud) of the Kansas proceedings in the Missouri and Illinois actions to register the Kansas judgment as a foreign judgment in those states. See Point II above.

Fairness in the prior proceedings, however, must be established before the principle of collateral estoppel applies.

Factors to be considered in determining whether the prior proceeding afforded a "full and fair" opportunity to litigate include the availability of new evidence. **A to Z Assocs. v. Cooper**, 161 Misc. 2d 283, 289, 613 N.Y.S. 2d 512 (N.Y. 1993). It has been held unfair to apply collateral estoppel where the court in the former proceeding did not have jurisdiction to hear the issue in question. **Hellesvig v Hellesvig**, 59 Or. App. 356, 360, 650 P.2d 1072 (Or.App. 1982), citing **State Farm v. Century Home**, 275 Or. 97, 105, 550 P.2d 1185 (1976). The ruling of the Missouri Board of Accountancy on September 7, 1999 and the supporting affidavit of Leslie S. Shapiro, as well as the deposition testimony of Judge James Logan in this proceeding and the affidavit of William Walker filed with the Board of Accountancy, were not available as evidence at the time of the Kansas proceeding. Importantly, the Missouri Board of Accountancy had not ruled.

While the Kansas Supreme Court previously determined that Respondent's due process rights were not violated by the ex parte conversation, a finding of minimum of due process does not equate to a determination of a "fair hearing" for purposes of collateral estoppel. If it did, the "fair hearing" element of collateral estoppel would be rendered meaningless because if the court in the prior proceeding determined that due process had not been afforded, there would be no prior judgment, and if it did not, there would be nothing for the current court to decide with respect to the "fairness" issue.

The United States Supreme Court has previously held that the federal courts are not required to accept the findings of fact in prior state court judgments where there is reason to doubt the **quality, extensiveness, or fairness of the procedures** followed in

the prior litigation. **Kremer v. Chemical Construction Corp.**, 456 U.S. 461, 481 (1982) hold:

> "re-determination of issues is warranted if there is reason to doubt the quality, extensiveness or fairness of procedures followed in prior litigation."
>
> Accord, **Montana v. U.S.**, 440 U.S. 147, 164, n. 11 (1979).

It is thus necessary for this court to determine the issue of "fairness" as an element of the collateral estoppel doctrine.

Judge Russell clearly admitted that she was unable to be fair and impartial at the time of the ex parte conversation which she believed occurred on May 24, 1996, just as she had almost finished her memorandum opinion (which was published a week later). John Gerstle believed the conversation had occurred much earlier, but could not be certain.

Judge Russell acknowledged, however, that at the time of the ex parte conversation, **she already believed** that Nancy Kessler had a cocaine problem. She quickly concluded from the ex parte conversation, that Respondent was somehow involved with Nancy Kessler's alleged cocaine and had prepared the amended tax return to cover up that cocaine use. She surely already "suspected" the same before the ex parte conversation.

The journal entry contains significant changes from the memorandum opinion. The hearing to resolve the disputes over the journal entry occurred on July 19, 1996, at least eight weeks after the ex parte conversation, and at least eight weeks after Judge Russell acknowledged she was no longer able to be fair and impartial toward Respondent.

Respondent's post-judgment motion that was scheduled for hearing before Judge Russell at the time of her recusal, on November 8, 1996, was never heard on the merits. Judge Sheppard concluded that it was not his responsibility to review the discretionary ruling of Judge Russell. The Kansas Supreme Court then reviewed Judge Sheppard's ruling on abuse of discretion and whether there was any substantial evidence standards. A fair hearing would have afforded Respondent a de novo review at the trial court level, either by Judge Russell or by her replacement. That is the purpose of post-judgment motions. Judge Sheppard, ruled, however, that it was an issue best to be decided on appeal (under an abuse of discretion and whether there was any substantial evidence standards).

Judge Russell's conclusion that Respondent vehemently argued the amended tax return in opposition to the summary judgment motion and in support of a motion to sanction Mr. Dunham (**Ex.** 1, p. 3) is flatly contrary to the record. Respondent stated only, during oral argument on April 13, 1995, that the amended tax return was an evidentiary detail which was not outcome determinative.

The amended tax return was found by Judge Russell to be immaterial to the summary judgment proceeding.

Less than one year later, however, in ruling on the sanctions motions, Judge Russell ruled that "but for" the amended tax return, the fraud counterclaim could not have been filed. There was no supporting facts, evidence or even arguments from DAI and Mr. Dunham to that effect, and that conclusionary statement has never been explained.

No one has explained the transformation from "immaterial" to "but for". K.S.A. 60-2007 requires specific findings of fact and reasons for the findings.

More significantly, the record clearly establishes that the difference between the two tax returns ($37,000) would only affect the amount of actual damages, not the fact of actual damages. At most the damage claim would be reduced from $255,000 to $218,000. That does not support a conclusion that "but for" the amended tax return, the counterclaim for fraud could not have been filed.

Judge Russell also substituted the journal entry Mr. Dunham prepared, for her memorandum opinion, on July 19, 1996, based upon Mr. Dunham's argument that the purpose was to "button up the record" to reduce Respondent's prospects on appeal. This was at least eight weeks after the ex parte conversation.

The Kansas Courts also did not have subject matter jurisdiction to determine that the amended tax return is a "false" tax return.

These circumstances preclude a rigid and mechanical application of the principles of collateral estoppel to the Kansas judgment. Overriding considerations of fairness apply here. **Oates v. Safeco Ins. Co. of America**, 583 S.W.2d 713, 720 (Mo.Banc 1979).

VI.

THE SUPREME COURT SHOULD ADOPT THE FINDING OF THE HEARING PANEL THAT IT COULD NOT CONCLUDE THAT RESPONDENT VIOLATED ANY OF THE RULES OF CONDUCT, OR ALTERNATIVELY ACCEPT ITS RECOMMENDATION TO APPOINT A SPECIAL MASTER, BECAUSE THE PROCEEDINGS IN KANSAS WERE INITIATED AND PROSECUTED BY DAI AND MR. DUNHAM, RESPONDENT'S ANTAGONISTS, AS PROCEDURAL WEAPONS TO GAIN A TACTICAL LITIGATION ADVANTAGE, IN VIOLATION OF THE RULES OF CONDUCT WHICH PROVIDE THAT THE PURPOSE OF THE RULES CAN BE SUBVERTED WHEN THEY ARE INVOKED BY OPPOSING PARTIES AS PROCEDURAL WEAPONS.

Rule 4 of the Missouri Rules of Professional Conduct, under "scope" provides:

"SCOPE

The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself***

Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule.***"

Although Mr. Dunham and DAI invoked the Rules of Conduct in their motions for sanctions and to remove Respondent's authority to practice in the Johnson County case pro hac vice, they did not notify the disciplinary authorities of either Missouri or Illinois or Kansas of their contentions that Respondent had violated the Rules of Conduct.

Instead, DAI and Mr. Dunham requested a ruling from Judge Russell on the facts, coupled with a request that she then submit those findings to the Missouri and Illinois disciplinary authorities with the imprimatur of the court.

Mr. Dunham and DAI attempted to accomplish the same result, through Judge Sheppard, recently when they asked him to sanction Respondent and write a special report to the Missouri Supreme Court to assist the court in deciding the merits of this proceeding. **Ex.** QQQ, pp. 22-24.

In response to a question as to whether DAI and Mr. Dunham had initiated these charges against Respondent for the purpose of obtaining a litigation advantage, in violation of the Rules of Conduct, Judge Logan testified (**Ex.** OOO, pp. 38-39):

> "***It appears to me that they are doing everything they can to eliminate you, their nemesis. In a way, they regard you as a nemesis of some sort that they want to eliminate and they are doing it. And I don't approve of that – those kind of tactics. I think everything should be decided on the merits and that – I had – that's fragmentary evidence but it looks pretty bad to me."

Respondent has litigated a number of cases with DAI and Mr. Dunham. All of the cases below involved DAI. In most, but not all, DAI was represented by Mr. Dunham.

Mr. Dunham and DAI have enforced sanctions against other attorneys representing Subway franchisees. See **Gerardo Mariani v. Doctor's Associates, Inc., et al.**, 983 F.2d 2nd 5 (1st. Cir. 1993). Respondent was not involved in that case.

In **Yates v. Doctor's Associates, Inc.**, 549 N.E. 2d 1010 (Ill.App. 1990), Respondent's clients (Cox and Yates) obtained a ruling that DAI had waived its right to compel them to arbitrate their claims in Connecticut by filing related eviction lawsuits against them in the name of its alter ego/agent leasing companies. One year later, Respondent's clients obtained an award of $200,000 actual and $1,000,000 punitive damages for fraud, which was affirmed on appeal. **Cox v. Doctor's Associates, Inc.**, 613 N.E. 2d 1306 (Ill.App. 1993). The annual, personal, income of Frederick A. DeLuca ("Mr. DeLuca") and Peter H. Buck ("Mr. Buck"), the two owners of DAI, was admitted for punitive damage purposes, since most of DAI's income was passed through the corporation to them personally, and DAI maintains a relatively low net worth. Mr. Buck and Mr. DeLuca are the fifty percent owners of DAI. By 1990, they were each receiving $27,000,000 per year in income through the Subway franchise operation and related investments.

DAI uses numerous, alter-ego, assetless, leasing companies to enter into leases with the landlords and subleases with their franchisees. The subleases contain a cross-default provision which provides that any breach of the franchise agreement by the franchisee is also a breach of the sublease. The rent under the sublease is the same as the rent under the master lease and the franchisees are directed to pay the rent directly to the landlord. In this fashion, DAI can exercise its rights against the franchisees through

eviction lawsuits, under the subleases, in the name of its alter-ego leasing companies, while requiring the franchisees to arbitrate their related claims against DAI before the American Arbitration Association in Connecticut, pursuant to an arbitration clause in the franchise agreements.

DAI operated the leasing companies without assets, in the event the franchisee, sub-lessee failed financially and did not pay the rent to the landlord. Under those circumstances, the landlords would contact the leasing company (actually DAI) to demand payment of the rent. Under those circumstances, DAI would advise the landlord that they had a lease with an assetless shell which could not pay any judgment against it.

Nicholas Jannotta on behalf of his mother (now deceased) was one such landlord. He negotiated a lease with one of DAI's leasing companies, Subway Sandwich Shops, Inc. ("SSS") for some land owned by his mother in Chicago. He was led to believe that SSS was the franchisor with assets, which could pay the rent in the event the franchisee did not. He was experienced in real estate matters. He also negotiated a restricted trade area, prohibiting SSS and affiliated companies, from locating any Subway store within two miles of his location, coupled with a percentage of sales rent clause. If the Subway franchisee at the Jannotta location maintained sales at a certain level, additional rent would be due and the landlord would share in those additional revenues. DAI almost immediately installed six other Subway Stores within the restricted trade area, using other assetless, alter-ego, leasing companies, contending that they were not bound by the master lease with SSS. Eventually the last two franchisees at the Jannotta location failed and SSS refused to pay the rent. Respondent represented Mr. Jannotta in a trial in the

United States District Court for the Northern District of Illinois claiming fraud and breach of contract. By that time the annual personal income of Mr. DeLuca and Mr. Buck had increased to $60,000,000 per year a piece (for 1994). A massive motion for summary judgment by DAI was argued and denied at about the same time as the motion for summary judgment in the Kessler & Banks case.

The jury returned a verdict for actual damages of about $325,000, and the court added about $175,000 in attorneys fees under a clause in the lease. The jury also awarded $10,000,000 in punitive damages. DAI, Mr. Buck and Mr. DeLuca and SSS appealed only the punitive damage award. The Seventh Circuit concluded that there was overwhelming evidence of fraud and corporate complicity by Mr. DeLuca and Mr. Buck, but reversed the punitive damage award for a new trial on the grounds that a jury instruction on corporate complicity should have issued. **Jannotta v. Subway Sandwich Shops, Inc., et al.** 125 F.3d 503 (7th Cir. 1997). Immediately before that trial, DAI paid more than $1,300,000 to approximately 82 other landlords holding claims and/or judgments against the assetless leasing companies for unpaid rent. There were still a number of unpaid judgments that were introduced into evidence during the trial.

The Seventh Circuit reverse for a new trial on punitive damages only. The second jury awarded punitive damages in the total sum of $100,000. DAI argued that Mr. Jannotta had already been fully compensated (as a result of the first trial) and that it had corrected its previous fraudulent practices, arguing that mistakes were made but they had all been corrected. The trial court added about $130,000 in attorneys fees under a clause in the lease. DAI paid the punitive damage award, but appealed the award of attorneys

fees, contending that Mr. Jannotta was not the prevailing party because he only recovered $100,000 in punitive damages. By the time of the second trial during November, 1998, Mr. DeLuca's annual income for 1997 had risen to $120,000,000 and Mr. Buck (by then retired) had income of about $73,000,000. Their incomes were again admitted into evidence for punitive damage purposes. The Seventh Circuit affirmed the award of attorneys fees and added an additional $26,000 in attorneys fees, under the clause in the lease, incurred in the defense of the second appeal. See **Jannotta v. Subway Sandwich Shops, et al.**, 225 F.3d 815 (7th Cir. 2000), where the court begins the opinion as follows:

> "Peter Buck, Frederick DeLuca and Doctor's Associates, Inc. committed gross fraud in their dealings with the Plaintiffs, and they do not dispute the jury finding to that effect."

After the Cox case, DAI adopted a strategy of filing federal actions in the United States District Court of Connecticut against any franchisee that brought suit against it in the state court in which the franchise was located. The federal actions sought only to compel the franchisees to arbitrate in Connecticut under the terms of the arbitration clause and the franchise agreement while enjoining the franchisees from litigating their claims under the state franchise act in the state in which the franchise was located. See **Doctor's Associates, Inc. v. Distajo, et al.**, 66 F.3d 438 (2nd Cir. 1995) and **Doctor's Associates, Inc. v. Distajo, et al.**, 107 F.3d 126 (2nd Cir. 1997). Respondent represented Distajo, et al. in those cases and Mr. Dunham represented DAI. See also **Doctor's Associates, Inc. v. Erik Hamilton**, 150 F.3d 157 (2nd Cir. 1998) and **Subway**

Equipment Leasing Corp. v Forte and Sims, 169 F.3d 324 (5th Cir. 1999). DAI continued to use its assetless leasing companies to file eviction lawsuits against the franchisees in state court to resolve its claims against them.

In **Subway Restaurants, Inc., et al. v Riggs**, 696 N.E. 2nd 733 (Ill.App. 1998), Subway Restaurants, Inc. (one of DAI's assetless alter-ego, leasing companies) filed an eviction action against Subway franchisee, Riggs, in Chicago. Mr. Riggs filed suit against DAI, et al. in the federal court in Chicago and DAI filed suit against Mr. Riggs in the federal court in Connecticut to compel him to arbitrate his claims before the American Arbitration Association in Connecticut. The federal court in Connecticut ordered Mr. Riggs to arbitrate all his claims, including some of his defenses to the eviction action, while Subway Restaurants, Inc. continued to prosecute the eviction action. Judgment was entered for money damages against Mr. Riggs in the eviction action. The Illinois Appellate Court set aside the judgment on the grounds that it was inequitable to enter the eviction judgment (for money damages) against Mr. Riggs while he was enjoined by the federal court, at the request of DAI, from raising all the defenses available to him in that action.

Respondent respectively submits that the motions filed against him by DAI and Mr. Dunham in Kansas, including the most recent one before Judge Sheppard, were filed for the purpose of obtaining a litigation advantage in other pending cases and that this conflicts with the stated purpose for the Rules of Conduct.

Under these circumstances, it would be appropriate to adopt the finding of the hearing panel that it could not conclude that Respondent violated any of the Rules of Conduct.

These circumstances preclude a rigid and mechanical application of the principles of collateral estoppel to the Kansas judgment. Overriding considerations of fairness apply here. **Oates v. Safeco Ins. Co. of America**, 583 S.W.2d 713, 720 (Mo.Banc 1979).

VII

THE SUPREME COURT SHOULD ADOPT THE FINDING OF THE HEARING PANEL THAT IT COULD NOT CONCLUDE THAT THE RESPONDENT VIOLATED RULES OF CONDUCT 4-3.3, 4-3.4 AND 4-4.1 BECAUSE INFORMANT DOES NOT CHALLENGE THOSE FINDINGS IN ITS BRIEF BEFORE THIS COURT.

The information charges Respondent with violation of Rules 4-3.3, 4-3.4 and 4-4.1. The hearing panel found that it could not conclude that Respondent violated any of the Rules of Conduct, including 4-3.3, 4-3.4 and 4-4.1. Informant does not contest that finding before this court.

Under these circumstance, it would be appropriate for this court to adopt the finding of the hearing panel that it could not conclude that Respondent violated rules of conduct 4-3.3, 4-3.4 and 4-4.1.

Since the hearing panel ruled it could not conclude that Respondent violated these rules, and Informant has not argued for a contrary ruling before this court, the necessary overriding consideration of fairness, which precludes a rigid and mechanical application of the principle of collateral estoppel is present in this case. **Oates v. Safeco Ins. Co. of America**, 583 S.W.2d 713, 720 (Mo.Banc 1979).

CONCLUSION

For the foregoing reasons, Respondent respectively submits that this court should adopt the finding of the hearing panel that it could not conclude that Respondent violated any of the Rules of Conduct with which he is charged, or alternatively, accept the recommendation of the hearing panel to appoint a special master to take additional evidence with respect to the charges that Respondent violated Rules 4-3.1 and 4-8.4(C).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of September, 2001, two copies of Respondent's Brief and one copy of a computer disk containing the Brief, have been mailed to Informant, by first class mail, postage prepaid, addressed as follows:

Ms. Sharon K. Weedin
Staff Counsel
3335 American Avenue
Jefferson City, MO 65109

Attorney for Informant

_____
David M. Duree

CERTIFICATION: SPECIAL RULE NO. 1(c)

I certify to the best of my knowledge, information and belief, that this brief:

1. Includes the information required by Rule 55.03;

2. Complies with the limitations contained in Rule 84.06, as per the court's order of August 21, 2001, repealing Special Rule No. 1.

3. Contains 22,199 words, according to Microsoft Word 2000, which is the word processing system used to prepare this brief; and

4. That McAfee Anti-virus software was used to scan the disk for viruses and that it is virus free.

_____
David M. Duree